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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~247~~ 27.

JARED E. REDFIELD, PLAINTIFF IN ERROR,

vs.

WILLIAM P. PARKS, CHARLES HARPER, ABNER B. WILLIAMS, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED APRIL 5, 1886.

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INDEX.

	Original.	Print.
Writ of error	1	1
Note of filing answers, &c.	2	1
Appointment of guardian *ad litem*	4	3
Note of filing answers	4	3
Note of filing motion for rule to file deeds, &c.	5	3
Note of filing exceptions to answers	5	3
Note of filing exceptions to tax deed	6	4
Note of filing motion to dismiss	6	4
Note of filing agreement that the court try the issues of fact	7	4
Order granting leave to amend, &c.	7	4
Judgment	9	5
Note of filing declarations of law, &c.	10	5
Note of filing bill of exceptions	10	6
Bill of exceptions	11	6
Exception to title of plaintiff	11	7
Finding of facts	13	7
Certificate of entry	13	8
Patent	15	8
Tax deed	18	10
Contract	24	13
Conclusions of law	26	15*
Plaintiff's requests	28	16
Citation	32	18
Clerk's certificate	33	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 31, 1888.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Jared E. Redfield, plaintiff, and William P. Parks, Charles Harper, Abner B. Williams, Burrill B. Battle, James M. Montgomery, C. E. Mitchell, as administrator *de bonis non* of the estate of Claiborne S. Barron, dec'd, and E. O. Clark, as guardian *ad litem* of Maggie M. Barron, Lent L. Barron, Walter Barron, George Barron, and Oscar Barron, heirs-at-law of C. S. Barron, dec'd, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 1st day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred & ninth.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States for the Eastern District of Arkansas.

Allowed by—
HENRY C. CALDWELL, *U. S. Dist. Judge.*

2 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 23rd day of October, anno Domini one thousand eight hundred and eighty-two, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on October 25th, 1882:

JARED E. REDFIELD
v.
WM. P. PARKS *et al.* } 3056.

Come the defendants, Williams and Battle and Montgomery and Parks, by Compton, Battle & Compton, Esq's, their attorneys, and file herein there separate answers, and come the defendants, Mitchell and Barron, by C. B. Moore, Esq., and on motion of said attorney leave is granted him until November 10th to file his answer.

And on November 6th, 1882, as follows:

JARED E. REDFIELD
v.
WM. P. PARKS *et al.* } 3056.

Come the defendants, Williams and Battle, by Compton, Battle & Compton, Esq's, their attorneys, and file herein exhibits to their answer.

3 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 9th day of April, anno Domini one thousand eight hundred and eighty-three, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on June 4th, 1883:

JARED E. REDFIELD
v.
W. P. PARKS *et al.* } 3056.

Comes the defendant, C. E. Mitchell, as administrator of Claiborne S. Barron, and the defendants, Maggie M. Barron, Lent L. Barron, Walter Barron, George Barron, and Oscar Barron, by C. B. Moore, Esq., their attorney, and file herein their joint and several answers.

4 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 22nd day of October, anno Domini one thousand eight hundred and eighty-three, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 2nd, 1883:

JARED E. REDFIELD
v.
WM. P. PARKS *et al.* } 3056.

Comes the plaintiff, by Clark & Williams, Esq's, his attorneys, and, upon their motion, E. O. Clark is hereby appointed guardian *ad litem* of the following defendants, minors under the age of twenty-one years, to wit, Maggie Barron, Lent G. Barron, Walter Barron, George Barron, and Oscar Barron, heirs-at-law of said Claiborne S. Barron, deceased; and thereupon comes said E. O. Clark and enters his acceptance of such appointment, and time is given him to file his answer as such guardian *ad litem* to said several minors.

And on November 5th, 1883, as follows:

J. E. REDFIELD
v.
WM. P. PARKS *et al.* } 3056.

Come Maggie M. Barron, Lent G. Barron, Walter Barron, George Barron, and Oscar Barron, minor heirs of C. S. Barron, deceased, by E. O. Clark, Esq., their attorney, and file herein their answer.

5 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on May 14th, 1884:

JARED E. REDFIELD
v.
W. P. PARKS *et al.* } 3056.

Come the defendants, by B. B. Battle and C. B. Moore, Esq's, their attorneys, and, by leave of court, file herein their motion for rule on plaintiffs to file copy of deeds, &c.

And on July 11th, 1884, as follows:

J. E. REDFIELD
v.
W. P. PARKS *et al.* } 3056.

Comes the plaintiff, by L. A. Pindall and Clark & Williams, Esq's, his attorneys, and files his exceptions to the answers of C. E. Mitchell *et al.* and Williams and Battle.

6 And on July 24th, 1884, as follows:

J. E. REDFIELD
v.
WM. P. PARKS *et al.* } 3056.

Comes the plaintiff, by Clark & Williams, Esq's, his attorneys, and files herein his exceptions to tax deed.

And on July 29th, 1884, as follows:

J. E. REDFIELD
v.
WM. P. PARKS *et al.* } 3056.

Come the defendants, by B. B. Battle, Esq., their attorney, and by leave of court file herein their motion to dismiss.

7 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 13th day of April, anno Domini one thousand eight hundred and eighty-five, at the United States court-room in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 25th, 1885:

J. E. REDFIELD
v.
W. P. PARKS *et al.* } 3056.

Comes the plaintiff, by Clark & Williams, Esq's, his attorneys, and come the defendants, by B. B. Battle and C. B. Moore, Esq's, their attorneys, and file herein their agreement that the court may try the issues of fact arising in this cause.

And on April 28th, 1885, as follows:

JARED E. REDFIELD
v.
WM. P. PARKS, CHARLES HARPER, ABNER B. WILLIAMS, Burrell B. Battle, James M. Montgumery, C. E. Mitchell, as Administrator *de bonis non* of the Estate of Claibourne S. Barron, Deceased, Maggie M. Barron, Lent L.
8 Barron, Walter Barron, George Barron, and Oscar Barron, Heirs-at-Law of C. S. Barron. } 3056.

On this day came the plaintiff, by Clark and Williams and L. A. Pindall, his attorneys, and the defendants, by C. B. Moore and B. B. Battle, their attorneys, and the plaintiff moved the court for leave to amend his complaint so as to show that Charles Main conveyed the land in controversy to plaintiff since the commencement of this action, and the defendants resisted the granting of such

leave, and the court granted said leave; and thereupon plaintiff amended his complainant accordingly by filing an amendment thereto, which is indorsed filed July 21st, 1884.

And thereupon, by leave of the court, the defendants filed exceptions to the deed executed by James Torrans, United States marshal for the eastern district of Arkansas, to Charles Main and the deed executed by Charles Main to plaintiff, and said exceptions were overruled by the court.

And thereupon the exceptions of plaintiff to the deed executed by the county clerk of La Fayette county to William P. Parks and James M. Montgumery are filed herein (the said exceptions being marked filed, respectively, July 11th, 1884, and July 24th, 1884), came on to be heard and were sustained, because said deed shows that the sale therein mentioned was on a day not authorized by law and was otherwise illegal and void, but leave is granted defendants to use the same as evidence to sustain their defenses under the statute of limitations.

And thereupon the motion of defendants to dismiss their action, which was filed herein on the 29th of July, 1884, was heard and overruled by the court because the same was not filed in time.

9 And the defendants, Abner B. Williams and Burrell B. Battle, by leave of the court, filed an amendment to their answer on file herein. It is further ordered that the foregoing orders of July 11th, 21st, and 29th, 1884, be entered *nunc pro tunc* as of the said dates.

And on the same day the following proceedings were had:

JARED E. REDFIELD
v.
WM. P. PARKS, CHARLES HARPER, ABNER B. WILLIAMS, Burrell B. Battle, James M. Montgumery, C. E. Mitchell, as Administrator *de bonis non* of the Estate of Claibourne S. Barron, Deceased, Maggie M. Barron, Lent L. Barron, Walter Barron, George Barron, and Oscar Barron, Heirs-at-Law of C. S. Barron. } 3056.

On this day came the plaintiff, by Clark & Williams and L. A. Pindall, his attorneys, and the defendants, by C. B. Moore and B. B. Battle, their attorneys, and announced themselves ready for trial, and this action came on for trial and was tried by the court without the intervention of a jury, the said parties having filed with the clerk a stipulation in writing waiving a jury, and the court having heard the evidence on the part of both parties finds the issues for the defendants.

It is therefore by the court considered and adjudged that the complaint herein be, and the same is hereby, dismissed on the merits of this action, and that defendants go hence without day,

10 recover of and from plaintiff all their costs herein sustained and have execution therefor.

And time is given to the plaintiff to prepare special findings of

fact in this case and a bill of exceptions to the ruling of the court upon the law.

And on April 29th, 1885, as follows:

JARED E. REDFIELD
v.
WM. P. PARKS. } 3056.

Comes the plaintiff and files herein certain declarations of law arising upon the facts in this case and asks the court — declare the same accordingly; and thereupon came E. O. Clark, guardian *ad litem* to the minor heirs, defendants herein, and, on his motion, it is ordered that he be allowed the sum of fifty dollars for services as such guardian *ad litem*, to be taxed as costs in the case.

And on June 30th, 1885, as follows:

JARED E. REDFIELD
v.
W. P. PARKS *et al.* } 3056.

Come the defendants, by Clark & Williams, Esq's, their
11 attorneys, and file herein their bill of exceptions and finding of facts, which is signed by the court and made a part of the record in this cause.

Which bill of exceptions is as follows:

JARED E. REDFIELD, Plaintiff,

v.

WILLIAM P. PARKS, CHARLES HARPER, ABNER B. WILLIAMS, BURRELL B. BATTLE, JAMES M. MONTGUMERY, C. E. MITCHELL, as Administrator *de bonis non* of the Estate of Claibourne S. Barron, Deceased, and E. O. Clark, as Guardian *ad litem* of Maggie M. Barron, Walter Barron, George Barron, and Oscar Barron, Heirs of C. S. Barron, Dec'd, Defendants.

Be it remembered that the defendants in the above-entitled cause on the — day of —, 1884, filed exceptions to the title of the plaintiff set out in the complaint, which were as follows:

Exceptions.

JARED E. REDFIELD *v.* WILLIAM P. PARKS *et al.*

Come defendants and except to each and both of the following deeds on file herein, to wit, the deed executed by James Torrans, United States marshal for the eastern district of Arkansas, to Charles Main, dated the 24th day of February, A. D. 1880, and the
12 deed executed by Charles Main to Jared E. Redfield and dated the 17th day of September, 1883, for the following reasons, to wit:

First. Because said deeds or either of them are not competent evidence in the trial of this action.

Second. Because said deeds and each of them show that the plaintiff, Jared E. Redfield, did not have legal title to the land in controversy herein or any part thereof at or before the commencement of this action.

C. B. MOORE & B. B. BATTLE,
Att'ys for Defendants.

And thereupon the plaintiff amended his complaint and the court, upon such amendment being made, overruled the exceptions, and the defendants excepted.

Be it further known that the plaintiff, on the — day of —, 1884, also filed exceptions to the tax deed exhibited with defendants' answer under which the defendants claim title to the land, and the court, after due consideration, sustained the exceptions and declared the said tax deed void as conveying any title to the lands, but held that said deed might be used as a color of title in and of their plea of the statute of limitations; and on the 27th day of April, 1885, the cause coming on for trial, the parties filed an agreement in writing authorizing the court to try the facts of the case, which the court proceeded to do, and, all the evidence being adduced and submitted to the court, the court found the following facts:

13 That the land in controversy, to wit, fractional section thirty-one (31), in township fifteen (15) south, range twenty-eight (28), formerly in La Fayette, now in Miller county, Arkansas. was, on the 10th day of December, 1856, a part of the public lands of the United States subject to private entry, and on that day the Mississippi, Ouachita and Red River Railroad Company purchased said land from the United States at her land office at Washington, Arkansas, and paid therefor in cash, and received the usual certificate of entry, of which the following is a copy, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 14th*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of Washington cash certificate No. 11238, in favor of the Mississippi, Ouachita and Red River railroad is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] N. C. McFARLAND,
Commissioner of General Land Office.

14 No. 11238.

LAND OFFICE AT WASHINGTON, ARK.,
September 10*th*, 1856.

I hereby certify that, in pursuance of law, Mississippi, Ouachita and Red River Railroad Company, residing at Ouachita, in — county, State of Arkansas, on this day purchased of the register of this office the fractional section No. thirty-one, in township No. fifteen south, in range number twenty-eight west, of the principal meridian, containing $475\frac{58}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, amounting to five hundred and ninety-four — forty-eight cents, for which the said Mississippi, Ouachita and Red River Railroad Company have made payment in full, as required by law:

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said Mississippi, Ouachita and Red River Railroad Company shall be entitled to receive a patent for the lot above described.

BENJ. P. JETT, *Register.*

Cash Entry.

LAND OFFICE AT WASHINGTON, ARKANSAS.

Approved for patent June 1st, 1874.

J. W. P.

Patented April 15th, 1875. Rec. vol. 32, page 266.

A patent for said land was afterwards issued, bearing date the 15th day of April, 1875, and is in words and figures as follows, to wit:

15 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 14*th*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of the Mississippi, Ouachita and Red River Railroad Company, founded on Washington, Arkansas, cash-book entry No. 11238, is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] N. C. McFARLAND,
Commissioner of General Land Office.

Certificate No. 11238.

The United States of America to all to whom these presents shall come, Greeting:

Whereas the Mississippi, Ouachita and Red River Railroad Company, of Ouachita, Arkansas, has deposited in the General Land Office of the United States a certificate of the register of the land

office at Washington, Arkansas, whereby it appears that full payment has been made by the said Mississippi, Ouachita and Red River Railroad Company, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for the fractional section thirty-one, in township fifteen south, of range twenty-eight west, in the district of lands formerly subject to sale at Washington, now Camden, Arkansas, containing four hundred and seventy-five
16 acres and fifty-eight hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Mississippi, Ouachita and Red River Railroad Company:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted — by these presents do give and grant unto the said Mississippi, Ouachita and Red River Railroad Company and its successors the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging, unto the said Mississippi, Ouachita and Red River Railroad Company and to its successors and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the fifteenth of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

By the President:

U. S. GRANT.
By S. D. WILLIAMS, *Secretary.*
[L. S.] L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded vol. 32, page 266.

17 That on the 12th day of November, 1875, by the consideration of the circuit court of the United States for the eastern district of Arkansas, Charles Main and others recovered judgment against the said Mississippi, Ouachita and Red River Railroad Company for the sum of $2,802,547, upon which judgment execution was issued, and said land levied upon and sold on the 10th day of October, 1878, and was purchased by the plaintiff, J. E. Redfield, for the sum of five hundred dollars, which was paid.

At the expiration of the period allowed by law for the redemption of land sold on execution, the plaintiff requested the marshal to execute and deliver to him a deed for said land. The marshal afterwards handed him a deed, which both the marshal and the plaintiff supposed was a deed to the plaintiff for said land, and this suit was brought under that impression; and it was not until afterwards, and upon consideration of the defendants' exceptions to the plaintiff's title papers, under sections 2632–2634 of Mansfield's Di-

gest, that plaintiff discovered that by a clerical misprision of the marshal's clerk who drafted said deed the name of Charles Main, one of the plaintiffs in the execution on which the land was sold, had been inserted in the deed as purchaser and grantor instead of the plaintiff's name.

Upon proof of these facts the court, comformably to the practice under section 2633, Mansfield's Digest, permitted the plaintiff to amend his complaint and exhibits and perfect the written evidence of his title by counting upon and filing a conveyance from said Charles Main to the plaintiff for said land, executed and delivered on the 17th day of September, 1883.

The deed from said Main to the plaintiff was executed solely to correct the error of the marshal in making the deed to the land to Main instead of the plaintiff, the said Main never having purchased said land nor having any interest therein other than that with which he was invested by the mistake of the marshal in
18 naming him as the grantee in the deed instead of the plaintiff. Said deed from Main to the plaintiff, dated 17th September, 1883, invested the plaintiff with the legal title to said land; provided that before its execution the defendants had not, by reason of the facts hereinafter to be stated, acquired title to the land by and through a purchase thereof at a tax sale and actual possession under said purchase for the period required by law to invest them with the legal title to said land, and bar the plaintiff's action.

Said land was assessed for taxation for the year 1868; the taxes were not paid and the land was returned delinquent and sold for the non-payment of the taxes of that year on the 10th day of August, 1869, and purchased for speculation by William P. Parks for the sum of $17.70, that being the amount of taxes, penalty, and costs due thereon.

The land was sold in a body as one tract.

Said Park received a certificate of purchase, and afterwards assigned an undivided half interest therein to James M. Montgumery, and on 11th August, 1871, the following tax deed was executed by the county clerk to said Parks and Montgumery for said land, to wit:

Clerk's Deed to Land Sold for Taxes Due Thereon for the Year 1869.

Whereas the following tract of land, in the county of La Fayette, in the State of Arkansas, was subject to taxation for the year 1868, to wit, fractional section 31, in township 15 south, of range 28 west, containing $475\frac{38}{100}$ acres, more or less; and whereas Eugenius A. Wilson, the acting commissioner and qualified assessor within and for said county, did, within the time prescribed by law, list and assess for taxation, for said year 1868, the said tract of land,
19 and did value the same, from the best sources of information within his reach, at the aggregate and price of six hundred dollars; and whereas said assessor did list and assess said tract of land in the name of unknown owner; and whereas said assessor did set down opposite said tract of land, in the assessment book furnished

him by the county clerk of said county, the said valuation as fixed by him as above stated; and whereas said assessor did on the thirty-first day of December, 1868, return said assessment book with said tract of land therein listed, assessed, and valued as aforesaid; and whereas there was a term of the county court of said county, begun and held on the thirty-first day of December, 1868, and continued in session for three consecutive days, and said assessment book was submitted to said court at said time as a court of appeals, upon the appraisement of the real property of said county, as made by the said assessor, and said court at said term did fix the valuation of said tract of land for the year 1868 at the price and sum of six hundred dollars; and whereas said court, at a term thereof begun and held on the sixth day of October, 1868, did fix the rate of taxes for the said county purposes for the year 1868 at one and one-eighth per cent. on the dollar on each and every dollar of the assessed value of said tract of land; and whereas said county clerk after receiving from the auditor of said State the amount of taxes levied for State purposes for the year of 1868, and from said court a statement of the rate and sum to be levied for the year 1868 for all county purposes of said county, did determine the sum to be levied upon the real and personal property of said county as taxes for the year 1868, and did determine that a tax of thirteen dollars and thirty cents should be levied on said tract of land for the year 1868, for all county and State purposes; and whereas said clerk did on the twentieth day of January, 1869, deliver the tax book of said county, for the year 1868, made out in the manner prescribed by law, to the county collector of said county containing a full and accurate description of said tract of land, also the valuation as adjudged by said court, and the sums levied on the same as aforesaid set down in appropriate columns with a warrant thereto attached, authorizing said collector to collect all taxes levied on the real property of said county for the year 1868, and set down in said tax book; and whereas Thomas M. Drewry, sheriff and *ex officio* collector of said county, then acting and duly qualified as such, did immediately, after receiving said tax book as aforesaid, — notice to be posted in three public places in each township in each county, one of which was at the place of holding elections in such township, stating on what days he or his deputy would attend at the place of holding elections in each township in said county, for the purpose of receiving said taxes, and said days did not exceed sixty days from the time of receiving said tax books by said collector; and whereas said collector did attend at said place according to said notice for the purpose aforesaid; and whereas the taxes levied on said tract of land as aforesaid or any part thereof were not paid within said sixty days or at any time before the sale thereof as hereinafter stated, and said collector within ten days after said sixty days did make out and return to said county clerk a delinquent list of all lands in said county, containing, among other lands, the above-described tract of land, on which said taxes so levied on the same were not paid; and whereas said clerk, immediately after the return of said delinquent list of lands, to wit, on the fourteenth day

of July, 1869, did cause such delinquent list to be published at least three weeks in the official newspaper for said county, to which list there was attached, and at the same time published a notice
21 that the whole or a sufficient number of said several tracts and lots in said list contained would be sold at the court-house in said county on the Monday next succeeding the expiration of said three weeks, and that said sale would continue from day to day until the whole or a sufficient number of tracts, etc., would be offered or sold to pay the taxes, penalty, and cost charges thereon; and whereas said collector did at the same time and place designated in said last-mentioned notice, and then and there, after the hour of ten o'clock in the morning, proceed to offer for sale, at public auction, separately, each tract of land or town lot contained in said advertisement, and on which the taxes, penalty, and costs were not paid, and continued said sale, from day to day, until the whole of said tracts and lots were offered and sold; and whereas said tract of land therein described was contained in said advertisement, and the taxes, penalty, and costs, respectively, charged on the same were not paid before said sale or the same was sold as herein stated; and whereas there was charged, due and owing on said tract of land, the sum of seventeen dollars and seventy cents for taxes, penalty, and costs; and whereas the said collector sold said described tract of land to W. P. Parks at said sale on the tenth day of August, 1869, for the sum of seventeen dollars and seventy cents, he being the highest bidder therefor; and whereas said W. P. Parks did forthwith pay said sum, for which said tract of land was sold as aforesaid to said collector; and whereas said clerk did make out and deliver to said W. P. Parks, at said sale, a certificate of purchase therein describing the aforesaid tract of land as the same was described in said tax book, and stating therein the amount of taxes, penalty, and costs, and the amount for which the same was sold; and whereas an undivided half interest in and to said certificate hath been assigned to James M. Montgumery; and whereas
22 said certificate hath been produced to the county clerk of said county and a deed to said tract of land demanded of him by the said W. P. Parks and James M. Montgumery; and whereas said tract of land or any part thereof hath not been redeemed within two years after said sale thereof:

Now, therefore, I, Volney V. Smith, the acting and duly commissioned county clerk of said county of La Fayette, in consideration of these premises and by authority of law, do, by these premises, grant, bargain, sell, and convey unto the said W. P. Parks and James M. Montgumery and his heirs the before mentioned and described tract of land; to have and hold the said tract of land unto the said W. P. Parks and James M. Montgumery, their heirs and assigns, in fee simple forever.

Witness my hand and seal of my office this 11th day of August, 1871.

V. V. SMITH,
County Clerk of La Fayette County, Ark.

STATE OF ARKANSAS, *County of La Fayette:*

Be it remembered that, on this 11th day of August, 1871, before E. A. Wilson, a justice of the peace within and for the county and State aforesaid, personally came Volney V. Smith, county clerk, to me known to be the person described in and who executed the annexed and foregoing deed, and acknowledged that he had signed and executed the same on the day of its date for the purposes and considerations therein contained and set forth, and desired me to annex my certificate to said deed of his acknowledgment, and I do hereby certify.

[L. S.] E. A. WILSON, *J. P.*

23 STATE OF ARKANSAS, *County of La Fayette:*

I, Volney V. Smith, county clerk and *ex officio* recorder within and for the county and State aforesaid, do hereby certify that the foregoing instrument of writing was filed in my office for record on the 11th day of August, 1871, and that the same, together with the certificate of acknowledgment and record thereto, is now duly recorded in Record Book P, page 512, &c.

Witness my hand and the seal of my office this 11th day of August, 1871.

V. V. SMITH,
Clerk and ex Officio Recorder.

STATE OF ARKANSAS, *County of La Fayette:*

I, Henry Moore, clerk of the circuit court and *ex officio* recorder within and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the deed of conveyance as therein set forth and as the same appears of record on pages 512, 513, 514, and 515, Record Book P, Deeds and Mortgages, La Fayette county, Ark.

Witness my hand and official seal this 21st day of February, A. D. 1877.

[L. S.] HENRY MOORE, *Clerk.*

This is Exhibit A to Henry Moore's deposition.
March 18th, 1884.

HENRY MOORE.

Ex. "A." W. H. Bush, Notary Public.

Opened and published by rule of court March 31st, 1884.

RALPH L. GOODRICH, *Clerk,*
By W. P. FEILDS, *D. C.*

24 In December, 1873, Parks and Montgumery, claiming the land under the tax deed, had the exterior lines of the section surveyed and marked and had a survey made for the purpose of ascertaining the center of the section, and in January, 1874, they entered upon the land under said tax deed and had a box-house

sixteen feet square, built at or near the center of the section, and put Charles Harper in possession of said house and section as their tenant and agent under the following written contract, to wit:

Copy.

JANUARY, 1884.

This is to show that Charles Harper has permission to remain upon and have the superintending, control, and possession of section thirty-one (31), in township fifteen (15) south, in range twenty-eight (28) west, situate in the county of La Fayette, in the State of Arkansas as our tenant for the purpose of keeping the same from being depredated upon, and to preserve the same from trespass, for and during the present year of 1874, he (Harper) agreeing to protect said property and not to sublet to any one, nor permit any timber to be cut or carried off except upon our order or the order of either of us, and said Harper is to give up possession of said premises to us or either of us, our heirs and assigns, upon demand signed in duplicate, date above.

MONTGUMERY AND PARKS,
By W. P. PARKS.
CHARLES HARPER.

"The within agreement is renewed for the years 1875 and 1876.
MONTGUMERY AND PARKS,
By W. P. PARKS.
CHAS. HARPER."

"The within agreement is renewed again for the year 1877.
Texarkana, Miller Co., Ark., January, 1877.
MONTGUMERY & PARKS,
By W. P. PARKS.
CHAS. HARPER."

25 EXHIBIT "E."

Harper added two shed rooms, each eight by sixteen feet, to the box dwelling-house; has built a crib and stable, and in 1874 he cleared and opened two and a half acres and in 1875 he cleared and fenced two and a half acres more, making five acres in all, and since he has been on the land he has set out fifty or sixty fruit trees. The improvements are made of rough boards and logs and are inexpensive, costing, probably, not much over one hundred dollars. Harper moved into the house on the land not later than February, 1874, and has lived there continuously from that date down to the present time, and as tenant and agent for Parks and Montgumery and their grantees in succession, including the defendants, has claimed for them possession of the whole section, and has kept persons from cutting timber or otherwise trespassing thereon, and has prosecuted persons criminally for trespassing thereon. The said land borders on the city of Texarkana, and the timber on it has been so well guarded and protected that the lines of the section can be distinctly

seen and traced by the full growth of timber thereon. The center of the section (that is, the corner of the four quarter sections of said land) is either under the house or inside the inclosure around the house.

No portion of said section has ever been inclosed, except the five acres heretofore mentioned.

Parks and Montgumery from the time they received the tax deed for said land claimed to own the same, and sold timber off the same, and assessed the same in their own names for taxation and paid the taxes thereon, and those claiming title by and through
26 Parks and Montgumery, including the present defendants, have done likewise. Previous to the time said box-house was built on said land by Parks and Montgumery and Harper put in possession of the same said land had been wild and uncultivated and in the actual possession of no one.

Harper occupied and protected the land for Parks and Montgumery and those claiming under them, including the defendants, for the privilege of living upon it and enjoying the improvements and getting his fire-wood and cultivating as much of the land as he pleased to put in cultivation, and he received no other compensation for protecting the land than the privilege of living upon it as aforesaid.

It is admitted by the plaintiff and the fact is that the defendants have by proper deed of conveyance acquired all the right, title, estate, and interest of the said Parks and Montgumery in and to said land. Said land is worth ten thousand dollars; that the plaintiff brought suit in ejectment in this court against said W. P. Parks for said lands on the 25th day of February, 1880, which was dismissed by the plaintiff on the 11th day of April, 1881, by reason of said Parks disclaiming any interest in the land, and the present suit was commenced on the 11th day of April, 1882. Said Parks had parted with all title and claim to said land before the institution of this suit against him for the lands on the 25th February, 1880, and the present defendants (except the said Parks) were not made parties to said suit. Said Parks had conveyed all his right and title to said land prior to the 25th day of February, 1880.

Upon the foregoing facts the court, of its own motion, declared the law to be—

1st. That said tax deed to Parks and Montgumery for said land is void, because the land was sold for the taxes of 1868 on a
27 day not authorized by law.

2nd. That under the laws of this State, notwithstanding said tax deed is void upon its face, for the reason stated, it constitutes a claim and color of title sufficient to put in motion the statute of limitations in favor of any person — possession under it.

3rd. That the possession taken by Parks and Montgumery of said land under said tax deed, in the manner set out in the finding of facts, constitutes in law actual, peaceable, open, notorious, and adverse possession of the whole of said land; and said possession of said land having been taken by Parks and Montgumery as early as the month of February, 1874, and maintained continuously by them

this action commenced within twelve months after the said suit was dismissed, preserved plaintiff's action from the bar of the statute of limitations, unless the statute had run for the full time required by law to complete the bar before the former suit was commenced.

31 But the court refused to declare the law to be as contained in the said declarations or either of them, but declared the law to be as contained in the court's declaration aforesaid.

To which decision of the court in refusing to declare the law to be as contained in the said several declarations of the plaintiff and declaring as in the court's several declarations plaintiff excepted at the time, and time was given him to prepare his bill of exceptions in that behalf, and now, to save the benefit of all his said several exceptions, the plaintiff tenders to the court this his bill of exceptions, and prays that the same may be signed by the court and made a part of the record in this case, which is done accordingly.

HENRY C. CALDWELL,
U. S. Dist. Judge, East. Dist. of Ark.

Which citation is as follows:

32 The United States of America — William P. Parks, Charles Harper, Abner B. Williams, *et al.*, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Arkansas, wherein Jared E. Redfield is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the district court, this 1st day of July, A. D. 1885.

HENRY C. CALDWELL.

33 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court, this 11th day of March, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and tenth.

[The Seal of the Circuit Court, Arkansas Districts, U. S. A.]

RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 247. Jared E. Redfield, plaintiff in error, *vs.* William P. Parks, Charles Harper, Abner B. Williams, *et al.* Filed April 5, 1886.

APPELLANT'S BRIEF.

IN THE

United States Supreme Court.

OCTOBER TERM, 1888.

JARED E. REDFIELD, *Plaintiff in error.*

vs.

WM. P. PARKS, CHARLES HARPER, ABNER B. WILLIAMS, *et al.*

United States Supreme Court.

NO. 247.

J. E. REDFIELD, Plaintiff in Error.

vs.

WM. P. PARKS, CHARLES HARPER, ABNER WILLIAMS, et al.

The Plaintiff in Error assigns for errors:

1. The Court erred in finding for the defendants in the cause, instead of the plaintiff, and in dismissing plaintiff's action.

2. The Court erred in declaring the law arising upon facts to be as contained in his 2nd, 3rd, 4th and 5th declarations of law, or as contained in either of such declarations. (Printed transcript pages 15-16.)

3. The Court erred in refusing to declare the law to be as contained in each and all the declarations of law, numbered from one to fifteen inclusive, prayed for by the plaintiff. (See pages 16-17 printed transcript.)

IN THE

U. S. SUPREME COURT,

OCTOBER TERM, 1888.

NO. 247.

JARED E. REDFIELD, *Plaintiff in error.*

vs.

WM. P. PARKS, CHARLES HARPER, ABNER B. WILLIAMS, *et al.*

APPELLANTS' BRIEF.

The land in controversy was entered by the Mississippi, Ouachita & Red River Railroad Company on the 10th of September, A. D. 1856.

That company issued its bonds, secured by mortgages, and became largely indebted, and when the war came on the company was rendered insolvent, and in fact became defunct, and until the 12th day of November, 1875, the company had no representatives and no one interested in said lands but the creditors, all or most of whom re-

sided in New York and Boston. But on the 12th of November, 1875, the creditors succeeded in obtaining a decree against that company, foreclosing the mortgages on the property and the franchises of the old company and a judgment for $2,802,547. The bond holders who purchased the franchise organized a new company, now known as the Little Rock, Mississippi River & Texas Railway, with the plaintiff in this suit, Jared E. Redfield, as President. The lands in controversy, which were virtually owned by the new company, were sold on an execution and bought in by Redfield, the President, on the 10th day of October, 1878; and this suit brought by Redfield on the 11th day of April, 1882, is for the benefit of the new company. An immense business was done just after the war in getting lands situated, as these were put upon the tax books, and buying them on speculation, *i e*, buying them for almost nothing to get a color of title, to be ripened into a good title by the statute of limitations, knowing that there was no one in existence to pay the taxes or redeem the lands.

Such was the case with the lands in controversy.

Judge Caldwell in his statement of facts merely states that Parks bought these lands on speculation. This statement is too indefinite. It may mean one thing or another. The Judge ought to have stated the facts and circumstances, but it is subject to construction by this Court. It means that he purchased the lands knowing

that the sale was void because the lands were not subject to taxation; because the sale was of the whole tract in a body, when the statute required lands to be sold in the smallest legal subdivisions; because they were sold on a day not authorized by law. But knowing the Railroad Company had no one to protect the lands or to pay the taxes or to redeem it, his object was to take advantage of the misfortunes of the company and steal the land through the statute of limitations. This is what the Judge means by "*speculation*," for it is what the evidence proved and is sustained by the other facts stated. Parks sold, or pretended to sell, a half interest to Montgomery. They run a line around the tract in order to find the center, and when found they put a box they called a house upon it, and put Harper—a man without means, a man of straw—in the house. Harper paid no rent. The purpose of protecting the lands from depredations is a false pretence, for such protection could as well have been rendered with a residence off the land as upon it. Harper ultimately and before the seven years was out cleared off and cultivated about five acres. This was done for his own use and not for that of Parks and Montgomery. They paid nothing. The whole contrivance was to try to bring themselves within the statute of limitations. But if they came within its letter, they did not come within its spirit—and the spirit of the law is the law. The whole proceeding was manifestly an attempt at a

gross fraud upon the statute. The parties had no object of buying or owning the lands to improve or cultivate them. They never designed to make a farm there, and did not want them for any useful purpose.

We submit that such proceeding is a fraud upon the statute of limitations which the courts will not recognize or enforce, for a void deed to lands which can operate as a color of title to give constructive, adverse possession must show on its face, and the circumstances of the purchase must be consistent with good faith and an honest purpose. A mere contrivance to steal $10,000 worth of land for $17 70-100 for no other purpose than the gain which the transaction itself involves, will not answer the statute requirements. Upon this point see *Gregg vs. Sayre*, 8 *Pet. U. S.*, 253.

In that case McLean, Justice, states in his opinion "that the deeds from Ormsby to Gregg and wife pur-"porting to convey a title in fee, *and having been accepted* "*in good faith by them*, the deeds did give color of title "under the statute of limitations." Thus holding that good faith and honest purpose is a necessary condition in a color of title. And see *Wilburn vs. Anderson*, 37 *Miss.*, 163, where the Court held that "to constitute a color of title under the statute of limitations the adverse claimant *must believe* the deed or will under which he claims gives him a sound title." And this is the modern doctrine of the courts, and we think it is well settled. See

Edge vs. Meeller, 82 *Penn. St.*, 98, 99.

Gibson, C. J., in *McCall vs. Nealy*, 3 *Watts* (*Penn.*), 72.

Atwood vs. Fricott, 17 *Cal.*, 43.

Buckley vs. Taggart, 62 *Ind.*, 238.

Miss. & Tenn. R. R. Co. vs. Devaney, 42 *Miss.*, 555.

Sedgwick & Wait's Trial of Titles to Land, *sec.* 775.

Lebanon Min. Co. vs. Rogers's 5 *Pacific Reporter*, 661.

Crispan vs. Hannavan, 50 *Mo.*, 544.

Fugate vs. Pierce, 49 *Mo.*, 447.

Bradly vs. West, 60 *Mo.*, 41.

Chapman vs. Templeton, 53 *Mo.*, 465.

Han. & St. Jo. R. R. Co. vs. Clark, 68 *Mo.*, 371.

Clase vs. Samm, 27 *Iowa*, 510.

Texas Land Co. vs. Williams, 51 *Texas*, 62.

It is conceded that the statute of limitations does not depend upon good faith or honesty of purpose so far as actual possession is concerned, but when constructive possession beyond actual possession is claimed through color of title the case is wholly different. *Kinney vs. Vinson*, 32 *Tex.*, 128. And to be in good faith the party must honestly believe he has a good title, and his purchase must be because he wants the land to cultivate, or for some useful purpose, and not on speculation. See *McCracken vs. City of San Francisco*, 16 *Cal.*, 636.

Dunn vs. Hunt Spencer (*N. J.*), 493.

Baker vs. Swan, 32 *Md.*, 355.

Foulke vs. Bond, 12 *Vroom* (*N. J.*), 547.

Again, the actual possession taken here by Parks and Montgomery was only sixteen feet square—sufficient for a box house of that size. The subsequent clearing of five acress was not done by them, nor for them. It was done by Harper for his own nse. The Court decides that the tax deed is and was at that time absolutely void—not voidable, but void. It was without power *propria vigore* to convey any interest whatever in the land. They were therefore trespassers. Can a man go on to another man's land without right, as a trespasser, and then by putting another man in his place as a tenant derive title by the statute? How can one man be a tenant to another in lands in which the lessor has no interest whatever? A mere trespasser cannot make a tenantcy. He cannot hold possession of another man's lands through a tenant, so as to obtain title through the statute of limitations. There must be a disseizin, and to work a disseizin the entry must be under a claim of title. What sort of a claim of title will will work a disseizin? Can A go to B and get him to make a deed to C's lands, and then by an entry under it disseize C? We know that a full disseizor has such an estate as that he can lease or sell it. But we insist that there was no disseizor here, but the entry was a bare trespass. See *Tiedman on Real Property, secs.* 693, 694.

But Harper here was not a tenant, admitting that the said tax deed was color of title and Parks' and Mont-

gomery's entry and building of the box house was an ouster of the true owner. There is no connection between the seizin they thus acquired and Harper's possession, for Harper was a mere licensee. The contract by which they resigned the possession to him was by its very terms a license to occupy the place for one year for his own benefit. It does not possess the first requisite of a lease. It is a mere permission to stay on the premises if Harper pleased to do so. By its terms, he could leave when he pleased, or they could resume control when they pleased. As a consideration for the privilege he was to protect the property from depredators for such time as he was there. We must abandon all distinction between a license and a tenancy to call this a tenancy. See *Tiedman on Real Property*, 651 and 652-3, and authorities cited.

Although the court calls it a tenancy, the whole statement of facts shows it to be nothing but a license.

He paid no rents and received no compensation. The use of the ground could be no compensation, further than as to the box house which they put him into, for they had no title whatever beyond that, and only a prior possession as to that.

The court will readily see that the arrangement here is in writing and controls the relation of the parties. It was renewed for the years 1875-6 and 7. (The date of the original contract, January 1884, is a mistake in the

transcript and should be '74) but it was never afterwards renewed, as will appear in the statement of facts. Now, if Harper was a tenant of Parks and Montgomery, did he ever attorn to the defendants? If he was a tenant he held by written lease and should have attorned to the defendants in writing, in order to connect the siezin in Parks and Montgomery, if they had any, with a seizin on the defendants. See *Tiedman on Real Property, section* 714 and cases cited.

At all events, if he was a tenant at all it was a tenancy at will, or by sufferance, and was determined upon the sale of the premises by Parks and Montgomery to these defendants. For this sale was after the written contract had expired. *Tiedman on Real Property*, 213, 714.

Doe vs. Thomas, 6 *Eng. Law and Eq.*, 487.

Hill vs. Jordan, 30 *Me.*, 367.

Morse vs. Goddard, 13 *Me.* 177.

Howard vs. Merriam, 5, *Cush.*, 563.

Steadman vs. Gassett, 18 *Vt.* 346.

Hemphell vs. Tevis, 4 *Watts, and S.* 535.

The Court's 3 and 5 declarations of law, and his refusal to declare as in the plaintiff's 1st, 5th, 14th and 15th declarations was, therefore erroneous.

That the third declaration of the Court is erroneous is too plain for argument. That Parks and Montgomery took "*actual*" possession of the whole of said land mentioned

in their deed, or that such *"actual"* possession was maintained by them, or their grantees down to the trial of the case, is directly contrary to the statement of facts. No actual possession, except as to five acres is pretended.

Our next position is that under bare color of title, constructive adverse possession will not extend beyond the parts and parcels of land upon which actual possession is taken.

The land here is a whole section divided into quarter sections, and quarter quarter sections, and so sold by the United States, and the State law required it to be so sold for taxes.

Putting a box house on the very center of the section would not give constructive possession to more than the four forty acre sub-divisions upon which his cabin existed.

And again, the doctrine of color of title does not extend the constructive possession beyond an amount of land reasonably needful to the cultivation or use of the portion being cultivated in actual possession.

We will consider and cite authorities on the two above positions together. *Thompson vs. Burhans*, 79th *N. Y.*, 100.

Among other things in that case the Court says:

"The part not actually possessed must be for use with

"or subservient to that actually possessed, and have "some necessary connection with it."

And again: "Such constructive possession will ex- "tend only to such land as is used in connection with "the improved land actually possessed, and to only so "much as is reasonable and proper for that purpose ac- "cording to the custom of the country."

It is not necessary to state that the case here is not within any of these requirements. The land not possessed here was not held for use of the land possessed, and had no necessary connection with it, nor if it was, it was not a reasonable amount for that purpose.

The same case decides that paying taxes, causing the lands to be surveyed and at times cutting logs and roads, does not make a case within these requirements.

And see *Jackson vs. Woodruff*, cited in *Sedgwick & Wait's Trial of Titles to Land, sec.* 774.

Chandler vs. Spear, 22 *Vt.*, 406.

Pepper vs. O'Dowd, 39 *Wis.*, 338, 350.

In that case the Court held where the premises were divided into known lots that "actual use on one lot cannot carry with it constructive use on another lot of the same piece of timber."

And see *Trumball vs. Stormer, 3d Pacific Rep.* (*Cal.*), 408.

We submit that this is the well settled modern doctrine, and that such being the law the Circuit Court palpably erred in refusing the 3d, 4th and 13th declarations

of law demanded by plaintiffs (page 16 trans.) and equally so in declaring as in his own declarations Nos. 3 and 5.

The Court refused to declare the law to be as in plaintiff's second declaration, as follows:

"That the tax deed having been declared void upon "the exceptions filed to the answer of defendants and "to the tax deed therein exhibited under the statute "the law is that the plaintiff is entitled to recover unless "the defendants have been in the adverse possession of "the lands for the term of seven years."

On what principle was this declaration refused? It is too plainly the law for argument.

There certainly was no ground, unless it is that the plaintiff was barred, not by adverse possession for seven years, or any other number of years, but by the two years' statute to which allusion is made in the statement of facts. Now that statute is as follows:

"No action for the recovery of any lands, or for the "possession thereof, against any person or persons, their "heirs or assigns, who may hold such lands by virtue of "a purchase thereof at a sale by the Collector or Com- "missioner of State Lands, for the non-payment of "taxes, or who may have purchased the same from the "State by virtue of an 'Act providing for the sale of "lands farfeited to the State for the non-payment of "taxes,' or who may hold such lands under a donation

to make the sale, or such as was material to the rights of the former owner.

The Court says: "We have no doubt of the power of "the legislature to ~~cause~~ cure any irregularity or illegality in a "tax sale which consists in a mere failure to observe some "requirement imposed, not by the constitution but by the "legislature itself. And the non-observance of which "does not deprive the former owner of any substantial right; "such as the failure of the collector to give bond, or the "failure of the assessor to take the oath of office or to verify "his assessment list by affidavit.

* * * * * * * * *

"But in this sweeping enactment the legislative depart- "ment transcended the boundaries of its powers. *It could* "*not under the constitution of 1868 or any similar constitu-* "*tion enact a statute which should transfer one man's property* "*to another, under a guise of a sale for non-poyment of taxes* "*when there had been no assessment or no levy of taxes.*

"This would not be due process of law."

And again the court says: "This two years statute "came before this Court in *C. & F. R. R. Co. vs. Parks*, 32 "*Ark.* 131. The substantial defense was that the County "Court had attempted to levy a school tax without be- "ing thereunto authorized by a vote of the qualified "electors of the school district. *It was decided that the* "*statute had no application to such a case.* And the de- "cision was sound, since the objection went to the

"jurisdiction of the County Court to levy the tax. It "was not a question of irregularity, but of power."

And again:

"We believe it (the statute of July 23d, 1868) has "been re-enacted in terms in every subsequent revenue "law we have had. Neither its validity or construction "has been settled by any previous decisions of this "Court, further than that it does not operate to deprive "the former owner of any meritorious defense. And by "meritorious defense we mean any act or ommission of "the revenue officers in violation of law, and prejudicial "to his rights or interest *as well as these jurisdictional and "fundamental defects which affect the power to levy the tax or "to sell for its non-payment.*"

In the case at bar the Court did not declare the deed voidable for any irregularities in the proceedings, but absolutely void for want of power to make the sale, and the case remains square within these decisions. These decisions apply as much to the Act of 1857 as to that of 1868, if not repealed. But that act has been regarded in this State as repealed and not in force ever since the date of the latter act.

This certainly disposes effectually of the argument founded upon the two years statute. Judge Caldwell certainly overlooked the course of legislation and these decisions in giving his third declarations of law, and, we submit, fatally erred in this declaration and in refusing the plaintiff's second declaration above recited.

We have a statute as follows:

"If any action shall be commenced within the time "respectively prescribed in this act (Stat. Lim.) and the "plaintiff therein suffer a non-suit, or, after a verdict for "him, the judgment be arrested, or, after judgment for "him the same be reversed on appeal or writ of error, "such plaintiff may commence a new action from time "to time within one year after such non-suit suffered or "judgment arrested or reversed, and if the cause of ac- "tion survive or descend to his heirs, or survive to his "executors or administrators, they may. in like manner, "commence a new action within the time herein al- "lowed to such plaintiff." (*Mans. Digist*, 4,497.)

This action was commenced within one year after the dismissal of a former action of the same kind, and clearly avoids the bar if we come within the statute. The Court says we do not because the former suit was against Parks alone, and Parks had disposed of his interest previous to that time. But the tenant of Parks was on the lands, and there was nothing on record to show that he had ever parted with his interest, except as to a half interest to Montgomery. We have shown, heretofore, that Harper never attorned legally to these defendants, nor is there any legal connection between the seizin of Parks and Montgomery and the defendants.

This is a real action. The first suit was against the

land as well as this. The suits or actions were substantially the same, against the same parties, and for the recovery of the same lands, and we submit that we are within the statute, and that the court erred in holding otherwise.

Lands entered of the government are subject to taxation from the time of their entry in this State. But the purchaser holds only an equitable title until the patent issues, nevertheless. and we submit that the statute of limitations, by adverse constructive possession, cannot commence to run against the owner until the patent issues. Whether it can or not has not been decided in this State, but it is well settled in other States.

Smith vs. Gorza, 15, *Tex.* 150.
Farley vs. Smith, 39, *Ala.* 88.
Beach vs. Gabriel, 29, *Cal.* 580.
D. Megreuder vs. Tooney, 51, *Cal.* 165.
And see *Duke vs. Thompson*, 16 *Ohio*, 34.
Thomas vs Hatch, 3 *Sumn.* (*C. C.*) 170.
Kennedy vs. Townsley, 16 *Ala.*, 289.

The patent issued in this case on the 15th day of April, 1875, and this action having been commenced on the 11th of April, 1882, we submit that seven years adverse occupancy had not accrued when the action commenced, and the Court erred in not giving the plaintiff's 8th, 9th and 10th declarations of law.

By the act of our Legislature entitled, "An Act in Aid of Public Improvements," approved April 8, 1869, all lands acquired by *grant* donation or subscription in "aid of the construction of railroads shall not be listed "or subject to taxation until conveyed to actual pur- "chasers."

Under this act railroad lands in Arkansas were not listed or assessed for taxation except in some cases where, like this case, they were caused to be listed and put upon the tax books by outsiders for the purpose of purchasing them until 1875. In that year, Nov. 30, the Legislature passed an act as follows:

That the Assessor in the different counties of this State shall at the time he assesses the personal property in his county in the year 1875, assess and place on the tax book of his county all the lands in his county heretofore donated, *granted*, or given to any railroad or railroad corporation, where the title to the lands has passed from the United States Government, and such lands shall thereafter be assessed and taxed as other lands in this State. (See *Acts of* 1875, *Adjourned Session, page* 29.)

Now we submit that these lands were not subject to pay a state or county tax until the date of this last act, and one of the provisions of every revenue act that has ever been passed in this State is that all tax proceedings, tax deeds or tax titles are void where the taxes had been paid or where

the lands were not subject to taxations, and we submit that the statute of limitations cannot take effect by virtue of any such void deed, and the Court erred in giving the plaintiffs 7th declaration of law.

All of which is respectfully submited.

SOL F. CLARK.

UNITED STATES SUPREME COURT.

J. E. REDFIELD, ET AL, *Plaintiffs in Error,*

vs. } *No. 247.*

W. P. PARKS, ET AL, *Defendants in Error.*

ADDITIONAL BRIEF FOR PLAINTIFFS.

The two years statute referred to by Judge Caldwell (*Mansfield's Digest, 4475,*) as a bar to our action, was a part of an act entitled "an act to quiet land titles in this State," approved Jan. 10th, 1857. It was error in our brief, therefore, to state that it was a part of a general revenue law.

In the act of 23d July, 1868, quoted in our brief, but more especially in the act of April 8th, 1869, both of which were revenue laws, the section referred to as being a bar to our action, was *revised and modified*, as held by our Supreme Court in *Coats v. Hill, 41 Ark., 149.* Other sections of that act were in controversy in that case, and on page 152 of the report the Court says:

"And the acts which are relied on as virtually repeal-
"ing it (the act in question) are the general revenue laws of
"July 23d, 1868, and of April 8th, 1869. So that these
"enactments are not precisely upon the same subject, nor do

"they cover the same field, and upon comparison of their "provisions it will be found *that the only inconsistency* be- "tween them *is as to the time within which the tax title must* "*be assailed, and the amount to be paid to the purchaser at* "*tax sale before he can be evicted.*"

"*And to this extent the former act may be considered as* "*revised and modified.*"

The section of these laws which the Court had in mind as working this *revision* and *modification* was the section referred to in our brief (as from the act of 1868, but in fact from that of 1869,) and quoted from *Mansfield's Digest, 5791*. Both this section and the one in question are set out in full in our brief, and the Court can readily see how and in what manner the former law was *revised* or *modified* in the language of the Court, and we submit that it could be only by a repeal of or a substitute for the former law, for the latter cannot otherwise take effect at all. If the former law is left to stand, then the latter is perfectly nugatory. The case of *Ratcliff v. Scruggs* cited in our brief, had reference to this latter law especially, but reached both laws, the one as well as the other, in its decision. It holds any law to be unconstitutional in its application to tax sales which is void (as is the case here), and not merely voidable for irregularities in the proceedings for levying the tax—void for want of power to make the sale, as well as for want of power to levy the tax. See the language of the Court in our former brief and our arguments thereon. We submit, therefore, that if the latter did not repeal the former, it so *revised* and *modified*

it as not to apply in this case. And if this is not so, even, our Supreme Court, in the case last cited, has plainly held that the two years' limitation cannot constitutionally apply in a case like this.

Upon the question whether Parks and Montgomery had such color of title as would bring them within the operation of the seven years' statute, we cite the following further authorities:

That a tax deed to be color of title must have been received in good faith. See

Winstemly v. Meacham, 58 Ill., 97.

Dalton v. Lucas, 63 Ill., 337.

Halloway v. Clark, 27 Ill., 486.

Where the deed is void because the sale is void, it gives neither seizure nor right to enter upon the premises.

Brookins v. Wooden, 73 Me., 225.

Wallingford v. Fisk, 24 Me., 387.

"An unauthorized sale passes neither title nor color of title."

McKee v. Lambertson, 2 W. & S., (Pa.) 114.

Cranmer v. Hall, 4 W. & S., 36.

Knox v. Cleveland, 13 Wis., 245.

Allen v. Morse, 72 Me., 502.

"Where a sale is void, a pretended tax deed is void upon its face." See

Bois v. Muram, 5 Fed. Rep., 439.

McGavock v. Pollock, 13 Neb., 535.

"And a sale is void where it was not made on a day authorized by law."

Chandler v. Keeler, 46 Iowa, 599.

Butler v. Delano, 42 Id., 350.

In Arkansas, lumping together two or more parcels of land and selling them in mass, renders the sale void, and renders the deed void *on its face*. See

2 Dillon's Rep., 256.

This is an Arkansas case.

The sale to Parks was void on both these grounds, and therefore the deed to Parks and Montgomery was void on its face, and could not be color of title to set in motion the statute of limitations. See

2 Desty on Taxation, pages 967, 969.

Respectfully submitted,

SOL. F. CLARK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1869.

NO. 27.

JARED E. REDFIELD,

Plaintiff in Error,

vs.

WILLIAM P. PARKS ETALS.

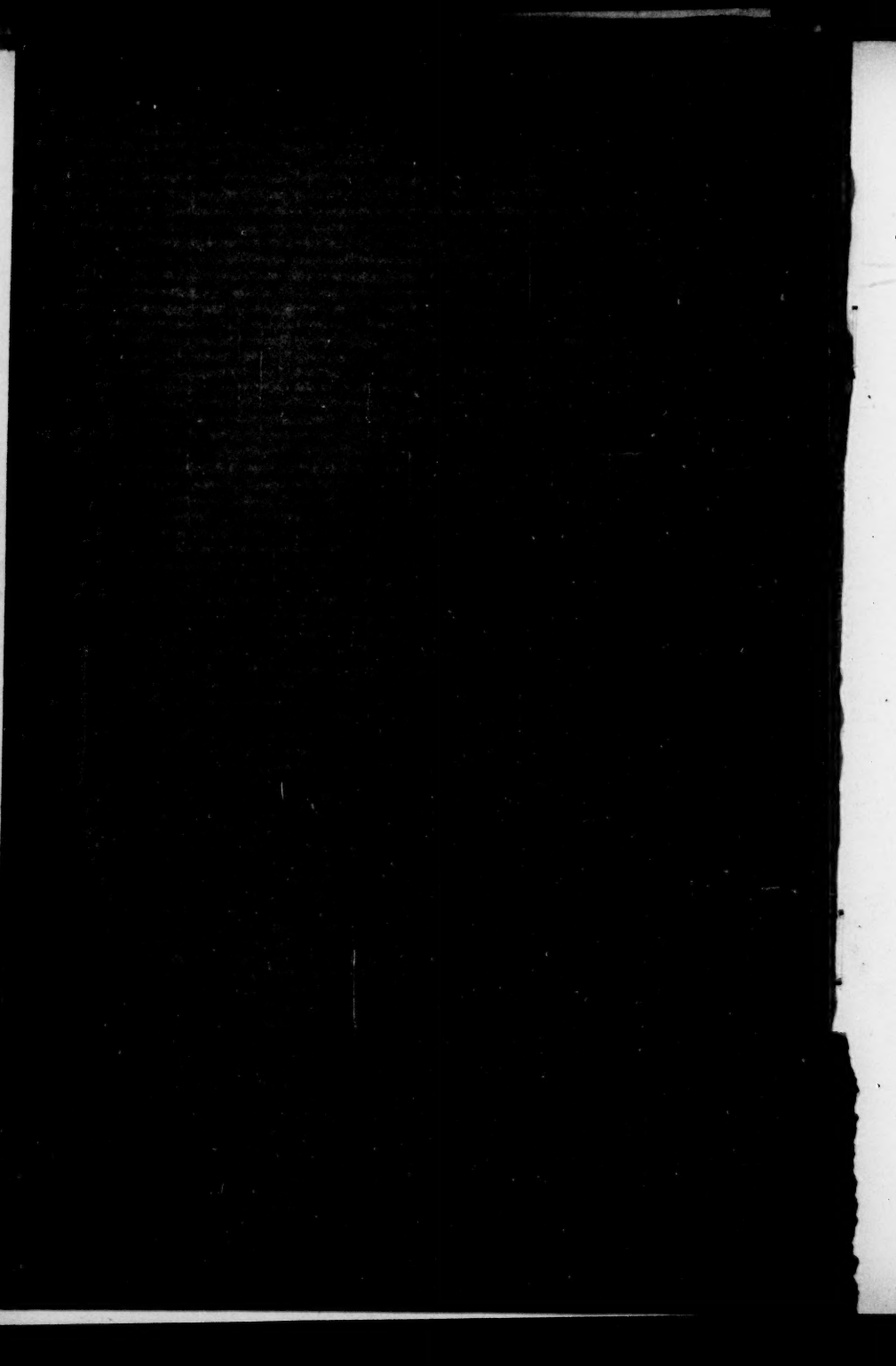
IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR,

BY

JOHN F. DILLON.

W. C. Bridgman's Printing Establishment, 146 Chatham Street, N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 27.

JARED E. REDFIELD,
Plaintiff in Error,

vs.

WILLIAM P. PARKS *et als.*

Brief for Plaintiff in Error, by John F. Dillon.

STATEMENT OF THE CASE.

This is an action of ejectment, commenced in the Circuit Court of the United States for the Eastern District of Arkansas, by Jared E. Redfield, plaintiff in error, against William P. Parks and others, defendants in error, for the recovery of land situated in Arkansas (Certiorari and Return, p. 1). The plaintiff is a citizen of Connecticut, and the defendants are citizens of Arkansas. The plaintiff claims title under a patent from the United States, and mesne conveyances (Certiorari and Return, p. 1, *et seq.*) The defendants claim title under an alleged tax sale, and collector's deed. Defendants also set up the Statutes of Limitations of the State of Arkansas, viz., the two years statute, and the seven years statute; and claim to have had adverse possession of the land in question (by and through

one Harper, their alleged agent for that purpose) for the prescribed times (Certiorari and Return, p. 2 *et seq.* For tax deed, see Record, p. 10).

The action was tried by the Court without a jury by stipulation of the parties (Record, p. 4). The Court found the facts as stated in the Record (pp. 7–15), and the law as stated in the Record (pp. 15–16). The findings of the Court were briefly: that the legal title is in the plaintiff; that the tax deed under which the defendants claim title was void upon its face, because the sale was made on a day not authorized by law, and therefore failed to convey any title to the purchaser at the tax sale, and therefore the defendants who claim under the tax sale have no title. But the Court found further that the defendants had been in adverse possession of the land for the prescribed times, and that therefore the plaintiffs were barred by the Statutes of Limitation above mentioned. Accordingly the Court gave judgment for the defendants dismissing the action (Record, p. 5).

The plaintiff duly excepted to the findings of the Court (Record, p. 16), prepared his bill of exceptions which was duly signed by the Court (Record, pp. 6–18), and sued out this writ of error (Record, pp. 1, 18). The case was submitted to this Court April 15, 1889 (*Redfield vs. Parks*, 130 U. S., 623). But on suggestion of a diminution of the record, leave was given to the plaintiff in error to sue out a writ of certiorari returnable at the October Term, 1889, to bring up the omitted part of the record (*Ib.*). Accordingly the writ of certiorari issued, and the return has been made.

The contention of the plaintiff in error is, that, even if it be fully admitted that the defendants had posses-

sion of the land in question as contended by them, yet no Statute of Limitation has run against the plaintiff. The seven years statute has not run, because the patent, under which plaintiff claims, was not issued till April 15, 1875 (Record, p. 8), and this action was brought within seven years thereafter, namely, on April 11, 1882 (Record, p. 15; and Certiorari and Return, p. 1). The two years statute has not run (either before or after the issue of the patent, April 15, 1875), because that statute has no application where the tax deed shows upon its face that the sale was void. Therefore, whatever may have been the character of the defendants' possession, the plaintiff is entitled to recover the land. But the plaintiff contends further, that there was no possession by the defendants of any of the land except four or five acres which were enclosed and occupied by their tenant Harper. Therefore, even if the Statutes of Limitation had run, so far as time is concerned, the plaintiff is entitled to recover all of the land but those four or five acres.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns as errors:

1. The Court erred in finding for the defendants in the cause, instead of the plaintiff, and in dismissing plaintiff's action.

2. The Court erred in finding the law arising upon the facts to be as contained in the 2d, 3d, 4th and 5th

declarations of law, or as contained in any of such declarations (Record, pp. 15–16).

3. The Court erred in not making the findings, numbered from one to fifteen inclusive, as requested by the plaintiff (Record, pp. 16–17).

ARGUMENT.

Summary of Argument.

I. The short and special Statute of Limitations of two years has no application because the tax deed was void upon its face (p. 5).

II. No Statute of Limitations could begin to run until the patent issued. No statute has run since the patent was issued. Hence, this action is not barred, no matter what kind or extent of possession the defendants may have had (p. 27).

III. The defendants had *actual* possession of only the five acres which were enclosed. Therefore, even if the Statutes of Limitations had run, they furnish no bar to the recovery of all the land except those five acres (p. 32).

IV. The doctrine of *constructive* possession under color of title has no application in the case of large tracts of wild and uncultivated lands, such as were the lands in the present case. Therefore, even if the

Statutes of Limitations had run, they would furnish no bar to the recovery of all the land except the five acres which were cleared and enclosed (p. 39).

V. The plaintiff's title is sufficient to maintain this suit. The plaintiff had title by relation at the commencement of the suit (p. 44).

VI. Under any possible theory of the case, the plaintiff is entitled to recover all of the land except the five acres which were enclosed and occupied by Harper, for defendants had no possession except of those five acres (p. 49).

I.

The short and special Statute of Limitations of two years has no application because the tax deed was void upon its face.

The Court below found that the tax deed was void upon its face (Record, p. 15).

THIS IS NOT A QUESTION OF COLOR OF TITLE. No Statute of Limitations requires color of title, as color of title, unless it is expressly so stated. All that they require (unless there is special provision that more is necessary) is that there shall be (1) *possession* for the prescribed time, and (2) that such possession shall be *adverse*. The only service or function of color of title is to show that the possession is adverse. But color of title is not necessary, even for that purpose. That possession is adverse may be shown in other ways; for

example, by a simple claim of title, without any basis whatever for the claim. The only requirement is that possession shall be, in a legal sense, hostile to the true owner. It is true the expression "color of title" has often been used as if it were a necessary condition for the running of the ordinary long Statute of Limitations. But this is not so; and the reason for the error lies in the misuse of the term, as if it were synonymous with adverse possession. And this misuse is undoubtedly due to the fact that a colorable title is so often used to show that possession is adverse. But a little reflection must convince any one that the two terms are by no means interchangeable, and that color of title is not necessary in order that the Statute of Limitations may run. It is common learning that the mere squatter who, claiming title, maintains actual possession for the time prescribed has under the ordinary long Statute of Limitations a perfect defense against an action for the recovery of the land so possessed. Yet such squatter has *no color of title* to the land; but he does have, what alone is required, adverse possession.

The ordinary long Statutes of Limitation require merely adverse possession. The short statutes, such as the two years statute in the present case, require adverse possession, and, *as a compensation for the shortening of the time*, that the defendant shall have "*something more than adverse possession.*" In order that such a statute may apply,

> "The possession must be not only hostile to the true owner of the land, but also under a particular description of sale, which must be evidenced by a deed, the essential and necessary ingredients of which are definitely prescribed."
>
> *Sutton vs. Stone*, 4 Neb., 319, and *infra*, p. 12.

The Supreme Court of Kentucky, speaking of a short and special statute, say:

"Instead of twenty years mentioned in the general act, but seven years is required by the Act of 1809, but to form a bar to an action, *something more is required by the latter act than an adverse possession for seven years.*"

Trustees vs. Payne, 3 T. B. Monroe (Ky.), 161, 163.

Mr. Justice COOLEY, speaking of a similar statute, says:

"This is a short and special Statute of Limitations, and no one can take advantage of its provisions who is not within them. The question here is not whether a void deed might not support adverse possession, but whether an adverse possession *has been had under such a deed as that statute indicates.*"

Toll vs. Wright, 37 Mich., 93, 100.

THIS ADDITIONAL REQUIREMENT is obviously not fulfilled by anything which shows upon its face that it fails to fulfill it. To hold that it could be thus fulfilled would be to hold that a fact is proved by proving its opposite. This "something more" which is required varies with the statutes of the different States. Many of these short statutes, which for obvious reasons are more frequently found in the newer States than in the older ones, are given at length, *infra*, together with the decisions under them, all of which fully sustain the doctrine here contended for.

The short Statute of Limitations of *Arkansas*, is as follows:

"No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof, at a sale by the collector, or commissioner of State lands, for the non-payment of

taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the non-payment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action."

Mansfield's Digest, § 4475.

Under that statute the party must have had not only (1) *possession*, (2) which must have been *adverse* (and one way of showing it was adverse was by showing a colorable title); but he must also have had such adverse possession under (3) a sale for taxes, and this last requirement is not fulfilled by a deed which shows upon its face that the sale was void. That is, even if color of title exists, its only service is to show that the possession is adverse, but adverse possession is not sufficient; the statute requires something more. That "something more" the defendants did not have in the present case.

The case of *Moore vs. Brown*, 11 How., 414, is on all fours with the present case, and is conclusive to the point that a tax sale, and *a deed which shows upon its face that the sale was void*, and possession thereunder for the time specified in the statute, will not set in motion the short Statute of Limitations prescribed for the case of lands held under tax-sales, tax-deeds, or tax-titles. The action was ejectment. The short Statute of Limitations in that case required a "title" and seven years adverse possession thereunder. It was admitted that the defendants had been in possession for the prescribed seven years. The "title" which the defendants set up, in connection with this short seven

years Statute of Limitations, was a purchase at a tax-sale, and a deed which showed upon its face that the sale was void because the sale was made at a time other than that authorized by law (exactly as was the fact in the present case). The Court held that this short Statute of Limitions required a "title" which was *prima facie* good, and was not satisfied with a purchase at a tax sale, and a deed which showed upon its face that the sale was void.

WAYNE, J., delivered the opinion of the Court.

"Upon the trial of the cause, after the plaintiff had introduced his testimony and rested his case upon it, the defendants, in order to bring themselves within the Limitation Act of Illinois, passed in 1835, offered in evidence, as the foundation of their title, a deed from the Auditor of Public Accounts of the State of Illinois. It purports to have been executed by virtue of a sale made on the 9th day of December, 1823, for the non-payment of taxes under the revenue act of February, 1823. The plaintiff's counsel objected to the introduction of the paper, and the Court were divided in opinion as to its admissibility.

"The second section of the Act of Limitation is as follows: 'Every real, possessory, ancestral or mixed action, or writ of right, brought for the recovery of any lands, tenements or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity deducible of record from this State or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes, or from any Sheriff, marshal or other person authorized to sell such land upon execution, or any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid' (Rev. Stat., 1845, p. 349).*

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*This is known as the "Limitation Act of 1835" of Illinois. The "Limitation Act of 1839," under which the Illinois cases which are referred to by the counsel for defendant in error were decided, is a wholly different act (See *Infra*, p. 24).

Upon comparing this section with the Acts of 1827 and 1829, upon the same subject, we have concluded that the section of the Act of 1835 was not meant to give protection to a person in possession under a deed void upon the face of it. The mode of determining that, is to test the deed by making a reference to the authority recited in it for making the sale, in connection with the act giving the auditor the power to sell.* When the sale is found not to be according to that power, the deed is void upon its face, because the action of the auditor is illegal, and the law presumes it to be known to a purchaser. The latter can acquire no title under it. Being a void deed, possession taken under it cannot be said to be adverse and under color of title. What was the fact in this case? It is disclosed upon the face of the deed, that the auditor sold the land short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser, as it was by the auditor. The law presumes it to have been. The act under which the sale was made was not meant to prescribe the authority of the auditor only to make sales, but also to give to purchasers full information of the terms upon which a title could be acquired to lands sold for the non-payment of taxes. It was meant to put bidders at a tax sale upon the inquiry, whether or not the land was offered for sale according to law. If they do not examine and shall buy land exposed to sale for taxes against the law they do so at their own risk, and it will be presumed against them that they know that the deeds given under such circumstances are made in violation of official duty and of the law. It cannot be made the foundation of an adverse possession under color of title against the true owner of the land, whose title to it, the law says, can only be devested in a cer-

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* In *Williams vs. Kirtland*, 13 Wall., 306, 309, Mr. Justice FIELD adopts the same method. He says:

"It may admit of much doubt, as also contended by counsel, whether the deed was not invalid on its face. The Act of 1862 declares that notice of the sale should be given for the second Monday of January, 1863. The deed shows that the sale took place on the 11th of February following, and contains no recitals explaining the disregard of the day designated by the statute and the selection of a different day."

tain way for a failure to pay taxes due upon the land. We do not put the conclusion upon the point exclusively upon the fact that it is a void deed, but that it is so, being a deed made in violation of law. It is such a deed that the defendant proposes to use to let in the proof of a possession which will be protected by the statute of 1835. Upon general principles such a paper would not be admissible as evidence for any purpose in ejectment, and we think it was not meant to be included as one of those titles of record provided for by the Act of 1835. Before the limitation of the act can operate it must be shown by one claiming its protection that he has been in actual possession of the land to which it is sought to be applied for seven years before the commencement of the suit by a connected title in law or equity, deducible of record from the State or the United States, or from any public officer or other person authorized by law to sell such land for the non-payment of taxes. * * * *A title and seven years actual residence upon the land are necessary. The Legislature must have meant by title something more than a void deed upon its face;* a title at least which would be sufficient to induce the possessor of the land to think and the law to conclude that there was a foundation for a possession under a right which had been acquired by a purchase. Not a mere naked possession but one in good faith by a purchaser. The protection intended by the act cannot be better expressed than it is in the able printed argument of the plaintiff's counsel. 'The Legislature intended to extend its protection to persons who occupied land under a connected title *prima facie* good, against proof *aliunde* which would rebut or destroy such *prima facie* title.' This conclusion, too, is supported by the case of *Skyles' Heirs vs. King's Heirs*, in 2 A. K. Marshall, 385.

We shall direct the point certified to this Court to be answered, that the paper offered in evidence by the defendant is a *void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered.*"

Walker vs. Turner, 9 Wheat, 541, was an action of ejectment. The plaintiff gave in evidence a deed to himself dated August 6, 1790. The defendant gave in

evidence a Sheriff's deed, dated July 22, 1809, to a person under whom the defendant claimed, and further introduced evidence to show that he and those under whom he claimed had been in possession for seven years or more before this action, which was commenced in May, 1818. A statute of Tennesse where the land was situated, provided (p. 549):

"That in all cases wherever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit in law be set up to said land, within the aforesaid term, that then and in that case, the person, &c., &c., holding possession as aforesaid, shall be entitled to hold possession, in preference to all other claimants, of such quantity of land as shall be specified in his, her, or their said grant or deed of conveyance, founded on a grant as aforesaid."

The Sheriff's deed in that case, under which (in connection with possession for the prescribed time) the defendant claimed, was void for want of jurisdiction, as appeared from the recitals of the deed when compared with the laws of the State.

The Court held that posession under such a deed was not protected by the short Statute of Limitations above quoted.

In *Sutton vs. Stone*, 4 Neb., 319, the tax-deed in question was void upon its face because it did not have the seal of the county affixed to it as required by the statute. The action was ejectment. The deed was offered in evidence, in connection with an offer to prove possession for the prescribed time, but was excluded by the Court. The question in the case on appeal was whether the deed was rightly excluded. It was contended by the defendant

(who claimed under the tax-deed) that the deed should have been received for the purpose of showing that he claimed under a tax deed, and, in connection therewith, that the short Statute of Limitations applicable in favor of those who claim under tax-deeds had run. But the Court held that this short statute had no application, because the tax-deed was *void upon its face.*

The Court in giving the opinion say :

" It was insisted quite strenuously on the argument, by counsel for plaintiffs in error, that, even although the deed should be adjudged void, yet it was admissible as, at least a colorable title, for the purpose of showing that their possession was under a claim of right. Such is, doubtless, the rule applicable to cases falling within the *general limitation act*, where exclusive adverse possession, in hostility to the owner of the fee is all that is required. But this rule cannot be invoked in a case where, like the one we are now considering, *the statute requires the possession to be not only hostile to the true owner of the land, but also under a particular description of sale, which must be evidenced by a deed, the essential and necessary ingredients of which are definitely described.* The Supreme Court of Kansas, in giving construction to a statute similar to our own on this subject, save that it in terms applied generally to ' lands sold for taxes,' used this language: ' It is only where a tax deed is good *prima facie*, and when, on account of some irregularity in the tax proceedings, the deed is void, or more properly speaking is voidable if attacked, that the statute of limitations can apply,' (*Bowman vs. Cockrill*, 6 Kan., 339.")

See also, to the same effect, *McGavock vs. Pollack*, 13 Neb., 535 (1882).

In *Waterson vs. Devoe*, 18 Kan., 223, the Supreme Court of *Kansas* held that a tax-deed which showed upon its face that it was void did not set in motion the short statute of limitations which applied to actions for the recovery of land sold for taxes.

The statute of Kansas provided (Report, *supra*, pp. 226–227):

"*That an action for the recovery of real property sold for taxes* can only be brought within two years after date of the recording of the tax-deed."

This statute, in all respects material to this controversy, is exactly the same in effect as the Arkansas statute in the present case (*supra*, p. 7).

In that case the land was sold for taxes May 5, 1863, the tax-deed was executed May 11, 1865, and was recorded July 24, 1865. Thus the time prescribed by the Kansas short statute above quoted *expired July 24, 1867. The action was begun in 1874.* The purchaser at the tax sale had had possession during all the time. But the Court held that the plaintiff was not barred by the short statute referred to.

In giving the opinion the Court say (p. 232):

"Referring again to the case of *Shoat vs. Walker supra* (6 Kan., 65), we quote: 'A tax deed to be sufficient, when recorded, to set the Statute of Limitation in operation must of itself be *prima facie* evidence of title. It is not necessary that the deed be absolutely good under all circumstances. It is not necessary that it be sufficient to withstand all evidence that may be brought against it to show that it is bad; but it must appear to be good upon its face; it must be a deed that would be good, if not attacked by evidence *aliunde*. When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No Statute of Limitations can then be brought in to aid its validity. The party accepting it, and claiming under it, has full notice of its illegality, and must abide the consequences of such illegality. He has no reason to complain.' And we add, that actual, open and notorious possession will not bring such a deed within the provisions of the *two-*

years Statute of Limitations. This conclusion disposes of the case against the claim of the plaintiff in error."

Kentucky had the ordinary long twenty years Statute of Limitations and a short seven years statute. In deciding a case in which the short statute arose, the Court say :

" We are brought to enquire whether or not the Court below, in the latter branch of its instructions was correct, in directing the jury that the plaintiffs could not recover, if they believed, from the evidence, that the defendants, and those under whom they claim had been actually possessed of the land for *seven* years next before the commencement of the ejectment. The possession of the defendants * * * ought to be construed to be adverse * * * and, if continued for *twenty* years, would, no doubt, bar the plaintiffs. But the instructions of the Court were not hypothecated upon the fact of the possession of the defendants having been such as to bring the case within the provisions of that act (the twenty years limitation) ; they were predicated upon the opinion the jury might form, on the evidence, as to a possession for *seven* years by the defendants, and those under whom they claim before the commencement of the plaintiff's action, so that the correctness of the instructions must turn upon the construction to be given to the Act of February, 1809, for the speedy adjustment of land claims ; between which and the general Act limiting the time of making entries, there is an essential difference, not only as to the length of possession which will bar a recovery, but also as to the circumstances with which the possession must be connected. Instead of twenty years mentioned in the general act, but seven years is required by the Act of 1809, *but* to form a bar to an action, *something more is required by the latter act than an adverse possession* for seven years—the possession " (in the case of the Kentucky Statute) " must have been acquired by actually *settling* upon the land," &c.

Trustees vs. Payne, 3 T. B. Monroe, (Ky), 161, 163.

See also *Skyles' Heirs vs. King's Heirs*, 2 A. K. Marsh. (Ky), 385.

Wisconsin has a short statue of limitations, as follows:

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid, or the lands redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed of sale and not thereafter (see Report, *infra*).

Cutler vs. Hurlbut, 29 Wis., 152 (1871), was an action brought to recover land, which had been sold for taxes, April 13, 1852, and a deed of which had been made on May 2, 1855, and recorded the same day. It was claimed by the defendants that this action, which was not commenced within three years after the recording of such tax deed, was barred by the statute above quoted. The plaintiff claimed that the tax deed was void for certain reasons which appeared upon the face of the deed, and therefore, the short statute had no application. The Court (though they dissented on another point which is immaterial in the present controversy), all agreed that if the tax deed was void (upon its face), the short statue of limitations had no application. They decided, however, that the deed was not void.

The Court say (p. 158):

"We are all of the opinion, that, if the tax deed to Lain is void, the defendants are not in a position to claim any rights by virtue of the three years statute of limitation."

The *Missouri* short statute of limitations is as follows:

"Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of

lands sold for taxes (except in cases where the taxes have been paid, or the land is not subject to taxation, or has been redeemed, as provided by law), shall be commenced within three years from the time of recording the tax deed, and not thereafter."

Wagner's Stat., p. 1207, § 221.

Under this statute, which is substantially like that of *Arkansas*, the decisions of the Courts of *Missouri*, following *Moore vs. Brown*, and other cases, *supra*, have been that—

"The special Statute of Limitations has no application except where the tax deed is valid upon its face."

Mason vs. Crowder, 85 Mo., 526, 532.

The Court in that case cited *Moore vs. Brown, supra*, and other authorities.

The same rule exists under a *Minnesota* short Statute of Limitations for tax sales.

In *Sheehy vs. Hinds*, 27 Minn., 259, the Court stated the principle therein decided as follows (p. 262):

"The sale itself being void, and the deeds being insufficient to make a *prima facie* case of title in the defendant, the question discussed as to the effect of the Statute of Limitations provided by Section 154, of said Chapter 11 of the General Statutes (1866), does not arise, as nothing is shown to have occurred to set the statute in motion."

See, also, to the same effect, *O'Mulcahey vs. Florer*, 27 Minn., 449.

The *Colorado* short Statute of Limitations is as follows:

"No action for the recovery of land sold for taxes

shall lie, unless the same be brought within five years after the sale thereof for taxes, as aforesaid, any law to the contrary notwithstanding, etc."

Gen. Laws, § 2335.

This statute is substantially like the *Arkansas* statute, except as to length of time.

Gomer vs. Chaffee, 6 Col., 314 (1882), was an action to recover possession of land. The plaintiff showed a chain of title from the government patentee. The defendant claimed by virtue of a tax sale, April 17, 1871, and a tax deed, April 24, 1873, to one through whom he traced his title.

The defendant also interposed a plea of the Statute of Limitations, that the plaintiff failed to bring his action within five years after the date of the tax sale of April 17, 1871. The Court below held the tax deed void on its face, but gave judgment for the defendant, on his plea of the Statute of Limitations.

The tax deed and sale were void upon their face, because the deed showed that the sale took place on April 17, 1871, whereas, under the provisions of the revenue act, the sale was not authorized until after the 20th of April, 1871. Thus "the tax deed bore on its face the evidence of this non-compliance with the law, and was a nullity."

The Supreme Court, reversing the decision of the lower Court, held, that the special Statute of Limitations had no application, because the tax deed showed upon its face that the sale was void (citing *Moore vs. Brown, supra*, and other cases).

The *Texas* short Statute of Limitations is as follows:

"Every suit to be instituted to recover real estate as

against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward, &c."

Sayles' Texas Civil Statutes, Art. 3193.

And the Texas Courts hold that this statute has no application where the deed is void upon its face.

Wofford vs. McKinna, 23 Tex., 36, 48.
Kilpatrick vs. Sisneros, 23 Tex., 113, 137.

In *Wofford vs. McKinna, supra*, where the above statute (cited from a different compilation) was in question the court say of the tax-deed (p.46):

"Being void upon its face, we think it is not such an instrument as was contemplated by the Sixteenth Section of the Act of Limitations. A deed which is void upon its face is a nullity. It is not a deed in fact and in law, in a legal, or any just sense of the term."

The case of *Toll vs. Wright*, 37 Mich., 93, cited by the defendants in error, is a distinct authority for the plaintiff. *The deed in that case was valid on its face.* On that very ground the Court (COOLEY, C. J.) distinguished the case from *Moore vs. Brown, supra.* After quoting at length from the opinion in the latter case, the learned Justice said (p. 100):

"We have extracted thus much from the opinion for the purpose of showing the exact ground on which the decision was placed, and it is seen to have been this: that the deed itself, by its own recitals, and without going beyond them, fully notified the defendant that it was not given in pursuance of any legal authority and was void. It is not claimed that such was the case here."

The same Justice, speaking of the *Michigan* short Statute of Limitations, continues:

"This is a short and special Statute of Limitations, and no one can take advantage of its provisions who is not within them. The question here is not whether a void deed might not support an adverse possession, but whether an adverse possession has been had under such a deed as that statute indicates."

This is the same doctrine that is stated at page 6 of this brief. The cases are unanimous that no one can claim the benefit of such a short and special statute under any instrument which shows upon its face that the requirements of such statute (in addition to that of adverse possession) are not fulfilled.

The common law rule of evidence with reference to a tax sale and tax deed made by statute authority is that performance of all the conditions precedent to the exercise of the statutory power to sell must first be fully proved by evidence *aliunde*, in order to lay a foundation for the introduction of the deed itself as evidence (see *Cooley on Taxation*, 2d Ed., p. 517). The question in *Toll vs. Wright*, *supra*, was whether this rule of evidence applied to the introduction of a deed, *valid on its face*, for the purpose of showing in connection therewith that the party had held adverse possession for the prescribed time. This was stated by Mr. Justice COOLEY, as follows:

"The principal question to be considered under this statute is whether one can rely upon it *without showing that the deed under which he claims was made to carry into effect a sale lawfully ordered.*"

This was the precise question that arose in *Pillow vs. Roberts*, 13 How., 472 (see *post*, p. 21). And in both these cases the courts rightly held that such proof

by evidence *aliunde* need not be made *where the deed is regular and valid on its face.*

But in both instances the Courts take pains to distinguish the cases from *Moore vs. Brown, supra, where the deed was void upon its face.* The deed, being void upon its face, instead of being *prima facie* evidence of a compliance with the conditions precedent to the exercise of the statutory power, is evidence of a non-compliance; and to allow such a deed to be introduced as evidence would lead to the absurdity of holding a thing to be proved by proving the opposite.

Pillow vs. Roberts, 13 How., 472, is cited by the counsel for the defendant in error. But neither the decision in that case, nor anything that is said in the opinion, in any way supports the contention of the defendants in the present case.

In *Pillow vs. Roberts* the deeds were *regular and valid on their face,* and on that very ground the Court distinguished the case from *Moore vs. Brown,* where the deed was void upon its face.

In *Pillow vs. Roberts, supra,* the question was whether certain tax-deeds, *regular on their face and containing recitals which corresponded with the statute provisions,* ought to have been admitted as (1) "evidence of a regular sale of the land mentioned therein for taxes," or (2), "Whether, without regard to their validity as elements of a good legal title *per se,* they should not have been received for the purpose of showing color of title, in connection with possession by the persons claiming under them, for a length of time sufficient by law to bar the entry of plaintiff" (p. 474).

The Court decided on the first point that the deeds

should have been received "as evidence (*prima facie*) of a regular and valid sale" for taxes, without the necessity of first proving by evidence *aliunde* that all the requirements of the statute had been complied with (and this was the point decided by the case). The statute of Arkansas so enacted. On this point Mr. Justice GRIER, after showing that these deeds *were regular on their face, and corresponded with the statute requirements,* concludes (p. 475) :

"These deeds come within the description of the 96th Section. They are made by a collector of the revenue ; they are acknowledged and recorded according to law ; *they purport to be for land* assessed for taxes, and *regularly sold according to law ;* and the law enacts that deeds, so made, shall be evidence not only of the grant by the collector, but of the regularity and legality of the sale of the land described therein. * * * *

The plain and obvious intention of the Legislature is clearly expressed in this 96th Section, that the deed when made by a collector of taxes, as authorized in the preceding section, when acknowledged and recorded, should be received in evidence as a good and valid title, and that the recitals of the deed showing that it was made in pursuance of a sale for taxes, should be evidence of the regularity and legality of the sale by virtue of that act. The deed being thus made, *per se, prima facie* evidence of a legal sale and a good title, the Court were bound to receive it as such. *There is nothing on the face of these deeds showing them to be irregular or void.*"

This decided the point (not involved in the present case) *as to the rule of evidence,* that a tax-deed, valid upon its face, is *prima facie* evidence of the regularity of the tax proceedings; and that the performance of conditions precedent need not be proved before introducing the deed itself, or afterwards until there is evidence introduced by the other party that such conditions have not been performed (see *ante,* p. 20). Such a deed

(until contradicted by extraneous evidence) is evidence of *title.*

Here the Court might have stopped, for enough had been said to decide the case. But the Court continued by stating a doctrine as to the Statute of Limitations, against which we do not contend—namely, that a deed which is *prima facie* valid might be received in evidence in connection with proof of adverse possession for the prescribed time. But the Court expressly confined this statement to a deed which is *prima facie* valid, and distinguished the case from *Moore vs. Brown*, 11 How., 424, as follows (p. 478) :

" The case of *Moore vs. Brown*, 11 How., 424, had reference to a *deed void on its face*, and the consequence of this fact under the peculiar statutes of Illinois (the " Limitation Act of 1835 ;" which is substantially like the Arkansas Statute now under consideration, see *ante*, p. 9) ; it furnishes no authority for the decision of the Court below in the present case."

The quotation from Mr. Justice GRIER'S opinion, given at page 20 of the brief for defendant in error, must be read with the qualification just mentioned. The learned Justice says :

" But assuming these deeds to be irregular and worthless, the Court erred in refusing to receive them in evidence in connection with proof of possession in order to establish a defense under the Statute of Limitation."

But the Justice meant " irregular and worthless "—*not upon their face*, for he had just stated that " *There is nothing on the face of these deeds showing them to be irregular or void* "—but " irregular and worthless " *as they could be shown by evidence aliunde.* What the Court contemplated throughout its whole opinion was a deed which was *prima facie* valid, but which could be shown by evidence *aliunde* to be worthless so far as

conveying a good title was concerned. This is conclusively shown by the way in which the case is distinguished by the Court from *Moore vs. Brown*, 11 How., 424.

There are several Statutes of Limitation of actions for the recovery of land in Illinois. They are widely different in their requirements. The one under which the decision in *Moore vs. Brown*, 11 How., 424, was given is, so far as the present question is concerned, substantially like the Arkansas short statute, as shown *supra*, pp. 7–9, and that case has never been questioned.

The Statute of 1839, on the contrary, is wholly different in its purpose. It requires seven years actual possession of the lands, seven years payment of taxes thereon, and claim and *color of title* made in good faith (Ill. Sts., Ch. 83, Par. 6). It was under this statute that the cases of *Hardin vs. Crate*, 60 Ill., 215, and *County of Piatt vs. Goodell*, 97 Ill., 84, cited by counsel for defendant in error, were decided.

These decisions go only to the point as to what is "color of title" under the Act of 1839. But they are not pertinent to the present cases, for, even if it be admitted that the tax-deed in the present case gave color of title, yet the only service of color of title under the two years Arkansas statute would be to show that the possession was adverse, and that statute requires, *besides adverse possession* (and thus, besides color of title) that there should have been a sale for taxes, and this last requirement is not met by a sale and deed thereunder which shows upon its face the sale was void. (See *ante*, pp. 6–9).

Thomas vs. Stickle, 32 Iowa, 71, 77, is cited on the

brief for defendant in error, p. 15. Mr. Justice MILLER (Wm. E.), delivering the opinion, cites in support thereof the case of *Pillow vs. Roberts*, 13 How., 472, and quotes from the opinion of Mr. Justice GRIER in the latter case to the effect that a party who claims under a tax deed *need not first show that all the requisites of the law have been complied with* (in other words, it is sufficient if he shows a deed which is *prima facie* good) in order to introduce the deed as evidence in connection with possession under the Statute of Limitation, and in reference to which Mr. Justice GRIER correctly says that "such a construction (one which would require proof of performance of all conditions precedent) would annul the act altogether," because it would show a valid *title*, and there would in that case be no need of the Statute of Limitation. But, while Mr. Justice GRIER, as has been shown (*supra*, p. 23), expressly confined his remarks to the case of a deed which was *valid upon its face* but assailable by evidence *aliunde*, Mr. Justice MILLER quotes them as if they applied to a deed which was void upon its face—an utter perversion both of the decision of this Court in *Pillow vs. Roberts* and of the remarks of Mr. Justice GRIER in his opinion.

Hall vs. Law, 102 U. S., 461, 466, has no bearing on the present case. The deed, so far as appears, was *prima facie* valid. The Statute of Limitation in question, moreover, was the ordinary long statute, to which wholly different considerations apply.

In *Logan vs. Jelks*, 34 Ark., 547, cited by counsel for defendant in error, the Statute of Limitations in question was the long seven years statute, and the question now under consideration did not arise.

The counsel for defendants also cites *Elliott vs. Pearce*, 20 Ark., 508, and *Cofer vs. Brooks, ibid., 542.* Those cases were decided under an early Arkansas statute which is no longer in force. But those cases do not sustain the point for which they are cited. In *Elliott vs. Pearce, supra*, it is true, the tax sale was irregular, *but it does not appear that this fact appeared upon the face of the deed.* On the contrary, it seems from the language of the Court that the deed must have been regular on its face.

The Court said (p. 516):

"It may be *assumed*, for the purposes of this case, that the objections made to the regularity of the tax sale are true in fact, and that the sale was irregular and illegal."

Why "*assume*" that the sale was not regular, if that fact was shown upon the face of the deed? This language is inconsistent with the idea that the deed showed *upon its face* that the sale was void.

In *Cofer vs. Brooks, supra*, the Court characterized the objections to the tax deeds in that case, as mere "*verbal criticisms.*" The Court said (p. 546):

"Without discussing the numerous objections made to the deeds, most of which are *verbal criticisms*, it may be conceded, &c."

The decisions in these two cases, therefore, do not support the contention of counsel for defendant in error. Any remarks by the Judges that have a seeming tendency in that direction are based on a misapprehension of what was decided in *Pillow vs. Roberts, supra*, and are contrary to the decisions of this Court (*vide supra*), and the unanimous current of authority.

Enough has been said by the Supreme Court of Ar-

kansas to show that the present two years Statute of Limitations which applies to tax sales would not receive any favor at its hands. If the Court inclined either way in any case, it would certainly be against allowing the statute to apply at all. In any event no construction would be put upon it which would be contrary to the unanimous interpretation of similar statutes of other States.

In *Douglass vs. Flynn*, 43 Ark., 398, the Court (EAKIN, J.), speaking of this statute, says (p. 409):

"Upon this review of our decisions upon this statute it must be confessed that they leave its true meaning and bearing somewhat vague and undefined. Since Mr. Justice FAIRCHILD'S attempt to shadow forth its policy and mark its limitations by great constitutional rights, it has been rather clipped and hemmed in by special regulations than expounded with reference to its whole policy and legislative intent. In each varying phase of circumstances the bar and bench encounter in it a new problem. The ghost arises ever and anon to haunt us, and doubtless will continue to do so until it may be effectually exorcised by legislative action. Enough has already been decided upon it, however, to enable me to say with some degree of assurance that the peculiar statute of January 10, 1857, is penal in its nature and to be strictly construed."

II.

No Statute of Limitations could begin to run until the patent issued. No statute has run since the patent was issued. Hence, this action is not barred, no matter what kind or extent of possession the defendants may have had.

The law on this point is well settled, both in this Court and in the State Courts.

The land in the present case was formerly part of the public domain of the United States. As such it was under the exclusive control and disposition of Congress. It came under the operation of State laws only after the patent had been issued. Until that time no State Statute of Limitations could begin to run. The reasons for this rule are that until the issue of the patent the title is in the United States, and the Statute of Limitations does not run against the United States, and the further reason, that no State can in any way interfere with the exclusive power conferred by the Constitution (Art. IV., Sect. 3) upon Congress to control and dispose of the territory belonging to the United States, or in any way prevent the grantee of the United States from obtaining the possession and enjoyment of the public domain when it is thus disposed of.

NO STATUTE OF LIMITATIONS HAS RUN. It has been shown (*supra*, Point I.) that the short two years Statute of Limitation has no application to the present case, because the statute has no application where a tax deed shows upon its face that the sale was void.

THE SEVEN YEARS STATUTE, even if it had begun to run at the time of the issue of the patent, had not expired when this action was commenced. The patent was issued April 15, 1875 (Record, p. 9). This action was commenced April 11, 1882 (Record, p. 15).

The decisions are unanimous, that no Statute of Limitations begins to run until the patent is issued.

Lindsey vs. Miller's Lessee, 6 Pet., 666 (1832), was an action of ejectment. The defendants offered in evi-

dence a patent issued by the Commonwealth of Virginia, dated March, 1789. They also gave in evidence an entry and survey of the land made in January, 1783, and duly recorded April 7, 1783. They then proved *possession for upwards of thirty years.* The plaintiff proved a patent from the United States, in which was the legal title, dated December 1, 1824. The action was brought about 1832, and, notwithstanding the thirty years possession by defendants, the plaintiff recovered the land.

In giving the opinion of the Court, McLEAN, J., said (p. 673):

"That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well settled principle, that the Statute of Limitations does not run against a State. If a contrary rule was sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the Statute of Limitations shall run; and then they would become invested with the title against the Government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the Government, to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the statute never operates against the Government. The title under which the plaintiff claimed emanated from the Government in 1824. Until this time there was no title adverse to the claim of the defendants. There can, therefore, be no bar to the plaintiff's action."

In *Bagnell vs. Broderick*, 13 Pet., 436, 450, CATRON, J., delivering the opinion of the Court, says:

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares *the patent the*

superior and conclusive evidence of legal title; until it issues the fee is in the Government; by the patent, it passes to the grantee, and he is entitled to recover possession in ejectment."

Gibson vs. Chouteau, 13 Wall., 92 (1871), was an action of ejectment. The plaintiff claimed under a patent from the United States, dated June, 1862, and mesne conveyances. The defendants had been in possession for more than ten years, the period prescribed by the Statute of Limitation, and defended the action of ejectment on that ground. But this Court held that the action was not barred.

Mr. Justice FIELD, delivering the opinion of the Court, said:

"It is matter of common knowledge that statutes of limitations do not run against the State * * * With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise * * * The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the Government. *With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was vested.*"

Mr. Justice FIELD, in that case considers also the doctrine of relation back, and shows that it has no application, so as to set the Statute of Limitation running before the issue of the patent.

See *Gibson vs. Chouteau, supra*, 13 Wall., 92, 100–102.

That the Statute of Limitations does not begin to run after entry, and before the patent issues, has been repeatedly decided by this Court (see cases *supra*). The principle on which these decisions rest has been well set forth in *Wilcox vs. Jackson*, 13 Pet., 498. In that case the Court say (p. 516):

"It has been said that the State of Illinois has a right to declare, by law, that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation. But the property in question was a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this, a *patent* is necessary to complete the title. But in this case no patent has issued; and, therefore, by the Laws of the United States the legal title has not passed, but remains in the United States. Now, if it were competent for a State Legislature to say that, notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the Laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress

only. And the practical result in this very case would be, by force of State legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this, that whenever the question in any court, State or federal is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the Laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the Laws of the United States."

"The legal title being in the United States, the Statute of Limitations raises no bar to the action."

Per FIELD, J., in *Oaksmith's Lessee vs. Johnston*, 92 U. S., 343.

See, also, to the same effect,

Thompson vs. Prince, 67 Ill., 281.
Wood vs. Ferguson's Lessee, 7 Ohio St., 288.
Clark vs. Southard, 16 Ohio St., 408.
Miller vs. Dunn, 62 Mo., 216.
Dunn vs. Miller, 75 Mo., 260, 272.
Cline's Heirs vs. Catron, 22 Gratt., 378, 392.
Iverson vs. Dubose, 27 Ala., 418.
Chiles vs. Calk, 4 Bibb (Ky.), 554.
Clements vs. Anderson, 46 Miss., 581.
Gardiner vs. Miller, 47 Cal., 570.
De Miranda vs. Toomey, 51 Cal., 165.

III.

The defendants had *actual* possession of only the five acres which were enclosed. Therefore, even if the Statutes of Limita-

tions had run, they furnish no bar to the recovery of all the land except those five acres.

The land in question was a large tract containing about 475 acres (Record, p. 9), and was "wild and uncultivated" (Record, p. 15), except as to the five acres which one Harper enclosed and cultivated by permission of the defendants (Record, pp. 14, 15). There was no enclosure of any of the land except of these five acres (Record, p. 15). *The only acts of possession which either Harper or the defendants Parks and Montgumery ever performed on the remaining 470 acres were the occasional cutting of firewood and timber*, and the prevention of other intruders from doing the same (Record, pp. 14, 15).

The payment of taxes, or surveying the land, shows nothing as to *possession itself;* it can only show, *after possession is proved*, that a possession is with a claim of title, that is, *adverse*.

"Payment of taxes, surveying and assertion of right do not constitute *possession*. They merely show a *claim of title*, and whenever it is important to show that, they are material."

Per EARL, J., in *Thompson vs. Burhans*, 79 N. Y., 93, 99.

Some Statutes of Limitation expressly require the payment of taxes by the person in possession (*e. g.*, the Limitation Act of 1839, of Illinois, *ante*, p. 24), and in that case payment of taxes becomes material, but not otherwise, except as showing *claim* of title.

The fact that there was a full growth of timber on the land has been referred to as if it were evidence of adverse possession. On the contrary, the full growth

of timber indicates the exact opposite, namely, that the true owner's possession is left undisturbed. It is rather the cutting of timber and clearing the land for cultivation that would indicate adverse possession.

All the authorities agree that the actual possession required in order that the statute may run must be *open and notorious*, so as to furnish *notice to the owner* that there is some one else in possession of his land (*Greenleaf on Evidence*, § 430, and cases cited). This requirement was clearly not satisfied in the present case. Here was a large tract of land—475 acres—covered with a thick growth of woods, and in the centre of these woods, away from the sight of men, a mere squatter (for such Harper was, so far as the plaintiffs had any notice) builds his shanty, clears a little land around his shanty, and puts up a fence around this little clearing. It can not for a moment be contended that this was an open and notorious possession of *the whole tract* of 475 acres. There was no open and notorious possession outside this little clearing.

Suppose the owner had visited his land, he would have found no indication of any adverse possession, except as to the five acres, and he would have found none as to those five acres except by penetrating into the interior of the woods. He might have gone to the boundaries of his land, and across his land from one part to another, and unless he had happened to pass almost directly through the centre of the land, he would have found no indication of adverse possession. *No fence around the land; timber all standing* (except possibly a little which the owner might readily suppose had been cut by trespassers), what better evidence could the

owner have wished that there was no adverse possession? The owner would have had to hunt for an adverse occupant. This is not the open and notorious possession which the law requires in order that the owner may have notice.

"In order to bar the true owner, the adverse possession relied upon is presumed to have been known and acquiesced in by him. It would be a fraud to deprive him of his property through a claim of which he not only knew nothing in fact, but which was not accompanied by acts that would, if he looked after his property, advise him of its existence. *In visiting his land the indications of the claim and possession should be so patent that he could not be deceived*, so that if he remain in ignorance it is his own fault."

Per BLISS, J., in *Musick vs. Barney*, 49 Mo., 458, 463.

In the present case the owner might have visited the land frequently, and found it apparently all right, and no indications of adverse possession.

"*The occupation must, in fact, be visible and notorious, inasmuch as the statute, as has been heretofore several times stated, proceeds upon the ground that there has been an acquiescence on the part of the owner of the land—a ground of supposition which can never exist, if an occupation be so clandestinely taken as not to afford notice of the same.* It is, therefore, incumbent on the person claiming land by virtue of possession, to show an actual occupation and appropriation of what he so claims, within some defined boundaries. One point, says SHAW, C. J., seems to be well settled, which is, that very strong acts of exclusive possession, such as building, enclosing or cultivating, and that for a long time, *and openly and notoriously*, are necessary, in order to constitute an actual ouster of the true owner, who has no notice of such acts (*Blood vs. Wood*, 1 Met., Mass., 528).

Angell on Limitations, 6 Ed., § 392.

The law is clear that an occasional cutting of timber, or firewood, on wild and unenclosed land, by a tres-

passer, or the prevention of other trespassers from doing the same will not amount to actual possession of the premises.

In *Parker vs. Parker*, 1 Allen (Mass.), 245, the Supreme Court of Massachusetts (HOAR, J.) said (p. 246):

"The Court left it to the jury to find whether the land in controversy was 'wild, unenclosed land,' upon all the evidence in the case, and instructed them that, if they found it to be such, the evidence of occupation was not sufficient to show title by possession. We think this instruction was correct and well supported by the authorities. There is a fallacy in the defendant's claim that his assumed possession, 'doing all those acts upon the land which good husbandry requires' would give him a title. Good husbandry required very little to be done, in a period of twenty years, upon land devoted to the growth of wood and left wild and unenclosed. The acts of possession were few, intermittent and equivocal. To constitute a title by possession the possession must be adverse, exclusive and continuous during that period. In the intervals of adverse enjoyment the possession is regarded by the law as following the title."

The evidence in that case was that defendant had occupied the land in question as a part of his homestead for a period of more than twenty years, some time before 1857, doing all those acts of possession during that time which good husbandry and economy required; that his homestead joined the land in controversy, and consisted of tillage land and a small wood-lot; that his twenty years' occupancy were in succession: that he, during that time, *among other acts of possession, cut his fire-wood, cut the bushes, and trimmed up the trees upon it, and that he once cut off the entire growth of wood thereon*, leaving it to grow over to wood again; and that his occupancy and acts of possession were within the

knowledge of, and without any objection from, the plaintiffs, or those under whom they claim.

In *Slater vs. Jepherson*, 6 Cush., 129, the learned Chief-Justice SHAW, giving the opinion, said (p. 131):

"On the trial of this case the tenant offered to prove title by grant and also by disseisin. The question of title by grant was left to the jury, upon the evidence, under instructions which were not objected to. On the subject of disseisin, the tenant offered evidence tending to show occupation, by *cutting wood and timber for use and for sale, the cutting off at one time of all the wood and timber standing upon the premises, the clearing of a small piece of the land with a view to cultivation*, the sale of a part of the premises, the running of a line between the premises and the demandant's other land, and the marking of the line run by lopping trees; and that such occupation was known to the demandants and those under whom they claim. The land demanded was open and unenclosed woodland."

But the Court held that this was not a sufficient possession.

In *Thompson vs. Burhans*, 79 N. Y., 93, the Court say (p. 99):

"Going upon land from time to time and cutting logs thereon, does not give possession. Such acts are merely tresspasses upon the land against the true owner, whoever he may be. Any other intruder may commit similar trespasses, without liability to any other trespasser. Such acts do not constitute a disseisin of the true owner. The plaintiff, at most, had actual possession of the shanty and the barn, and the land cleared about them for use with them."

In *Jackson vs. Schoonmaker*, 2 Johns., 230 (1807), the learned Chief Justice KENT held that even a "possession fence," made by trees felled and lapped one upon another, was not sufficient to satisfy the requirement of that open and notorious possession,

which is required in order to furnish notice to the owner. He said :

" The possession fence as it was termed, which was run round the large tract in 1774, I do not consider as an adverse possession, sufficient to toll the right of entry of the true owner, after twenty years. This mode of taking possession was too loose and equivocal. There must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defense, and is to countervail a legal title."

In that case the defendant had also a later deed, which was void, and whatever " color of title " such void deed gave him.

THE RECORDING of the tax deed did not furnish any actual or constructive notice to the owner of the land, so as to change the character of the adverse possession which was required.

In *Coburn vs. Hollis*, 3 Metc. (Mass.), 125, the Court (WILDE, J.) said (p. 128) :

" The Chief-Justice (SHAW) was requested to instruct the jury that the entry of said Hildreth under said deed, and his subsequent claim and occupation, would in law amount to an actual disseizin of the demandants' ancestor ; and that as the said Hildreth's *deed was recorded* long before the deed to demandants' ancestor, *less notorious occupation* by him would operate as a disseizin, than would be necessary if his deed had not been recorded. These instructions the Chief-Justice refused to give, and he instructed the jury that *the fact of the tenants' deeds being recorded prior to the deeds under which the demandants claim, was wholly immaterial.* This instruction is unquestionably correct, according to the decision in *Bates vs. Norcross*, 14 Pick., 224 (*q. v.*).

Now it appears, by the report of the case, that there was no evidence of any actual notice to the demandant's ancestor of the existence of the fence, on which the

tenant's counsel so much relies; *and such a lop fence, or possession fence, as it is sometimes termed, running as it did through woodland, we do not consider as sufficiently notorious, as indicating the limits of an adverse possession, to justify the jury in presuming that the demandant's ancestor had notice of it.* To make out an adverse possession in ejectment (as it was correctly decided in *Jackson vs. Schoonmaker*, 2 Johns., 230), the tenant must show a substantial inclosure, an actual occupancy, definite, positive and notorious."

IV.

The doctrine of *constructive* possession under color of title has no application in the case of large tracts of wild and uncultivated lands, such as were the lands in the present case. Therefore, even if the Statutes of Limitations had run, they would furnish no bar to the recovery of all the land except the five acres which were cleared and enclosed.

The rule, that where a person under color of title, has actual possession of a part of a tract of land, he has *constructive* possession of the remainder of the tract, undoubtedly applies, where the land is a *unit* and *small in area*, as a farm composed of tillage, meadow, and woodland in reasonable amounts for cultivation, or a tract of land with a dwelling house and appurtenances thereon. In such a case, every part is so related to the whole in its use and occupation that the actual possession of the main part and frequent acts of possession on the

remainder, may fairly be deemed a possession of the whole.

But such a doctrine obviously has no application to wild and uncultivated lands of large area, especially if such lands be not enclosed. Here, all reason for the rule ceases; and, *cessante ratione, cessat ipsa lex.* The rule is intended for the protection of *bona fide* occupants of land who use it for cultivation and improvement. Hence, the rule that constructive possession extends only to so much land as is necessary and proper for use in connection with the part that is *actually* occupied (see *Thompson vs. Burhans, infra*). The rule was never intended to be the means (as the defendants in the present case attempt to make it) of acquiring title to a large tract of wild and uncultivated land by a mere squatter's occupation of a small and insignificant part of it. Here an actual possession of part cannot in any fair sense be regarded as a possession of the whole, for one part has no necessary connection with another part, so as to form of the whole one complete unit. In such a case occasional acts of possession are but mere trespasses, and the Courts adopt the rule that *possession follows the title*, and the disseisor of part has no constructive possession of the remainder.

In *Miller vs. Shaw*, 7 Serg. & R., 129, the Court says (p. 142):

"Seisin and possession continue in the owner until he is disseised; and no further is the possession lost than of that which he is actually disseised. This is a doctrine of law familiar to those acquainted with its first rudiments; possession and the right are preserved together. The rightful owner, in presumption of law, is in constant possession until that possession is adversely interrupted and exclusively possessed by

another. A wrongful possession cannot be extended by construction; constructive possession always accompanies the right. It is a contradiction in terms, that a man, by wrong, should have any right, and that this right, by wrong, should be extended by construction. There cannot be two conflicting constructive possessions, one in the owner and the other in the trespasser. The right always draws to it the possession, and it there remains until seized by the wrongdoer, whose possession is strictly *possessio pedis;* who must necessarily be confined to what he has grasped, his real and actual possession. Beyond that, no length of time will protect him; because beyond that the owner's possession has never been changed; it always is, in contemplation of law, continued in him. These are the dictates of common sense, of common justice, and of common law."

See also Angell on Limitations, 6 Ed., § 384.

In *Jackson vs. Woodruff*, 1 Cow. (N. Y.), 276, the question was whether the actual possession, by a disseisor, of only a small part of a large tract of land (783 acres), *under a deed* which did not confer title, would make a constructive adverse possession as to the whole tract. The Court unanimously held that the doctrine of constructive possession of the whole by actual possession of a part had no application in such a case.

WOODWORTH, J., giving his opinion, said (p. 286):

"The doctrine of adverse possession, applied to a farm, or a single lot of land, is, in itself, reasonable and just. In the first place, *the quantity of land is small.* Possessions, thus taken, under a claim of title, are, generally, *for the purpose of cultivation and permanent improvement.* It is, generally, necessary to reserve a part for woodland. Good husbandry forbids the actual improvement of the whole. The possessions are, usually, in the neighborhood of others; the boundaries are marked and defined. Frequent acts of ownership, in parts not cultivated, give notoriety to the possession. Under such circumstances, there is but little danger

that a possession of twenty years will be matured against the right owner; if it occasionally happens, it will arise from a want of vigilance and care in him who has title. It is believed that no well founded complaint can be urged against the operation of the principle; *but the attempt to apply the same rule to cases where a large tract is conveyed, would be mischievous indeed.* Suppose a patent granted to A for 2,000 acres; B, without title, conveys 1,000 acres of the tract to C, who enters under the deed, claiming title, and improves one acre only; *this inconsiderable improvement may not be known to the proprietor, or if known, is disregarded for twenty years. Could it be gravely urged, that here was a good adverse possession to the one thousand acres?* If it could, I perceive no reason why the deed from B to C might not include the whole patent, and after the lapse of twenty years, equally divest the patentee's title to the whole; for there would exist an actual possession of one acre, with a claim of title" (under a deed) "to all the land comprised in the patent. No such doctrine was ever intended to be sanctioned by the Court. It may, therefore, be safely affirmed, that a small possession, taken under the deed to N. Platt, cannot under any circumstances, be a valid possession of the whole 783 acres, but is limited to the parcel improved."

In *Chandler vs. Spear*, 22 Vt., 388, the Court, speaking of the doctrine of constructive possession, say (p. 405):

"This doctrine, when applied to a tract of land of suitable size for the purposes of individual cultivation and improvement, seems justified and demanded by the wants and interests of a people in a new country; and to tracts of such limited dimensions the doctrine has been usually, if not always, applied in this State. This is the first instance that we are aware of in which *an attempt has been made, by means of clearing a few acres within the limits of an uncultivated township of some twenty thousand acres, to extend the possession by construction over the whole territory.* It is obvious, that *the reason on which the doctrine of constructive possession is founded ceases in such a case. Such an application of it is not required for the protection of bona fide settlers.*"

See also to the same effect,

Angell on Limitations, 6 Ed., § 403.
Buswell on Limitations, § 258.
Wood on Limitations, § 262.

In *Thompson vs. Burhans*, 79 N. Y., 93, the Court say (p. 99):

"Nor did the plaintiff have any constructive possession of the land. Constructive possession is based upon a written title which may be valid or invalid. The person having the valid title is always in law in the constructive possession of the land unless he has become disseised. But a person claiming land under a defective conveyance must have actual possession of part of the land, and that gives constructive possession of other land contained in the conveyance. In other words, he must have a written conveyance of the land and he must enter into actual possession of a part thereof claiming the whole, and then he may, *under certain circumstances*, have constructive possession of the whole. Constructive possession arises in no other way than this. *But the definition I have given is not yet complete. The part not actually possessed must be for use with or subservient to that actually possessed, and have some necessary connection therewith.*"

No argument is needed to show that in the present case the *four hundred and seventy* acres which were "not actually possessed" were not "for use with or subservient to" the *five* acres which were possessed, and that they did not have any "necessary connection therewith."

In any event, therefore, the plaintiff is entitled to recover all of the land except the five acres which were enclosed.

V.

The plaintiff's title is sufficient to maintain this suit. The plaintiff had title by relation at the commencement of the suit.

The rule of law on this point is so clearly stated in the following authorities, and the statements therein apply so well to the facts of the present case, that any attempt to add to them is unnecessary.

Among the findings of fact the Court below found (Record, pp. 9, 10) that the land in question was sold in execution by a United States marshal to the plaintiff Redfield, and that the said Redfield paid the purchase price therefor, which was $500. That at the expiration of the period allowed by law for redemption, the plaintiff, who was the purchaser at the execution sale, requested the marshal to make and deliver to him a deed for the land, which was done. And that it was not until afterwards discovered that by a mere clerical mistake in drafting the deed the name of Charles Main, the execution creditor, had been inserted as grantee in the deed instead of that of the plaintiff Redfield, who was the actual purchaser and who had paid the purchase money. As soon as this clerical error was discovered Charles Main executed a quit-claim deed, which recited the facts above stated, to the plaintiff Redfield (Certiorari and Return p. 5).

The authorities are unanimous that under such circumstances the purchaser at a sheriff's or marshal's sale has title by relation from the date of the sale.

This doctrine is stated by Mr. WASHBURN as follows:

"There are cases where the transaction is not complete and effectual in itself to convey a title to lands, but by being connected with other acts or transactions as parts of the one under consideration it becomes effective by the relation which the law creates between them whereby they are made to partake of the character of a single and integral act. It may be difficult to classify these cases; but a reference to a few of them will give a general idea of what is here meant. One of these would be the case of a sale of premises made by a Sheriff upon execution, but no deed delivered till a subsequent period, during which the judgment debtor had died. When the deed is given it has relation back to the sale, and is considered as then taking effect, and its validity is not affected by the intermediate death of the debtor. The rule stated in such cases is: 'Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation.' Several cases are mentioned in the one cited; and the language of KENT, C. J., in another case, was: 'A conveyance will, in many cases be deemed to relate back to the time when the agreement was concluded, and render valid any intermediate disposition of the land.' In *Landes vs. Brandt* (10 How., 348), the title in question was an imperfect one in the original claimant under the Spanish Government; and a creditor of the one holding this title seized and sold his title on execution; and subsequently to this the United States confirmed the title to the original claimant. The Court quote from Cruise with approbation as applicable to such cases: 'There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.' Another class of cases is one already mentioned where deeds have been delivered as escrows, and before the event happens upon which they are to be delivered the grantor dies, or if a *feme sole*, marries. In such cases when the contingency happens the deed is delivered, and takes effect

by relation from the date of the first delivery as an escrow."

3 Washburn on Real Property, 4th Ed., p. 308 (5th Ed., p. 328); and see cases there cited.

In *Jackson vs. Ramsey* (or McCall), 3 Cowen, 75, cited by Washburn, *supra*, the Court decided that this doctrine of relation applied to a Sheriff's deed executed after issue joined in the cause (the Sheriff's sale having been made before the commencement of the suit), so that the purchaser at the sale had a title at the commencement of the suit. SUTHERLAND, J., giving the opinion, said (p. 79):

"The principal question in the case is, whether a Sheriff's deed executed after issue joined in the cause, the sale having been made before the commencement of the suit, can be given in evidence by the defendant under the general issue, or should be pleaded *puis darrien continuance*.

"The declaration was returnable May Term, 1823. The consent rule bore date the 28th of May, and issue was joined the 4th of June in the same year. The Sheriff's sale of the premises in question was made on the 2d of October, 1818, but the deeds which were offered in evidence, and which were made in pursuance of that sale, were dated the 12th of August, 1823.

"The the general rule, requiring matter of defense which has arisen after issue joined, to be pleaded *puis darrien continuance*, is applicable to this as well as other actions, is abundantly settled in this Court. (*Jackson ex dem. Golden vs. Rich*, 7 John, 194; *Jackson vs. Demont*, 9 John., 60, *per* KENT, Ch. J.; *Jackson vs. McConnell*, 11 John., 424; *Jackson vs. Bell*, 19 John., 168).

"But it is contended on the part of the defendant that the deeds relate back to the day of sale by the Sheriff, and in judgment of law are considered as having been then given. The lessors of the plaintiff derived their title under the will of Alexander M'Michael, and the Sheriff's sale was under judgments obtained against M'Michael in his lifetime. When the defend-

ant entered into possession does not appear, but it is to be presumed that he entered under the title acquired by him at the Sheriff's sale. The lessors of the plaintiff stand in the same relation to the defendant that Alexander M'Michael would, had he been living and made a lessor. This, therefore, is a case to which the doctrine of relation is peculiarly applicable, there being no strangers or third persons, whose interest can be affected by it. That doctrine is this: *Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other act shall have relation* (*Vin. Ab. Tit. Relation*, 290. *Harper vs. The Bailiffs of Derby*, Wm. Jones, Rep., 428). This principle has been repeatedly recognized. In *Jackson, ex dem. Loan Officers of Rensselaer vs. Bull* (1 John. Cas., 81), it was held 'that a deed executed in pursuance of a previous contract for the same premises, is good by relation, from the time of making the contract, so as to render valid every intermediate sale or disposition of the land by the grantees' (*Jackson vs. Raymond*, *id.* 85, note; *Case vs. De Goes*, 3 Caines Rep., 262, *per* THOMPSON, J.; *Jackson vs. Bard*, 4 John., 234). In *Heath vs. Ross* (12 John., 140), a patent for land, dated the 4th of December, but which did not pass the great seal until the 28th, was held to relate back as between the parties, so as to vest the title in the patentee from the date. *Jackson, ex dem. Noah vs. Dickenson & Thompson* (15 John., 309), was the case of a Sheriff's sale made on the 1st of March, and the deed not delivered until the 9th (should be 19th; see the Report, 15 Johns., 309). On the 10th of the same month, a mortgagee of the same land filed a bill of foreclosure, without making the purchaser at the Sheriff's sale a party. It was held that the deed related back to the time of the sale; that the purchaser's time was acquired previous to the filing of the bill, and he was not precluded from contesting the validity of the mortgage in an action of ejectment. The Court say, '*the subsequent delivery of the deed, being mere matter of form, must have relation back to the time of purchase at the Sheriff's sale*' (*Johnson vs. Stagg*, 2 John. Rep., 250, *per* KENT, Ch. J. S. P.)."

Crowley vs. Wallace, 12 Mo., 143, was an action of

ejectment. The plaintiff introduced evidence of a sale in execution by a sheriff, and the sheriff's deed thereunder. The defendant objected that the deed was made subsequent to the institution of the ejectment suit; and that therefore the plaintiff did not have title at the commencement of the suit. But the Court held that the deed related back to the date of the original and principal act, namely, the sheriff's sale, and thus the plaintiffs had title by relation at the commencement of the ejectment suit.

NAPTON, J., delivering the opinion of the Court, said (p. 147):

"The objections to the Sheriff's deed are twofold. First, that it was executed on the 20th April, 1846, and the declaration was filed on the 9th of March previous, in which it is averred that the plaintiff's title accrued on the 20th October, 1845; and secondly, that the acknowledgment is insufficient."

The learned Judge held that the acknowledgment was sufficient; and, in regard to the first objection, said:

"The case of *Buxton vs. Carter* (11 Mo. R.) is cited in support of the first branch of this objection, and the case would certainly be decisive against the plaintiffs were it not for the intervention of another principle. I allude to the doctrine of relation, which is, that where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation. This principle has been often recognized, and is considered as peculiarly applicable to a case of this kind where no strangers or third persons can be affected. It is a fiction of law and cannot be applied to a better purpose than where it is used to prevent another fiction, the date of the demise in the declaration in ejectment from operating an inconvenience, if not an injury. The grounds upon which this doctrine is applied here are so forcibly stated by the Supreme Court of New York, in the case of *Jackson vs. McCall* (3 Cow. R., 75), that

I shall not add anything to what is there said. That case involved the precise question here suggested."

This rule of law has been applied in this Court also in *Landes vs. Brant*, 10 How., 348. CATRON, J., in delivering the opinion in that case, said (p. 372):

" To protect purchasers the rule applies that where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation, as stated in *Viner's Abr., tit. Relation*, 290. The doctrine of relation is well illustrated in *Jackson vs. Ramsay*, by the Supreme Court of New York, 3 Cowen, 75, and recognized by the Supreme Court of Missouri in the case of *Crowley vs. Wallace*, 12 Mo., 145.

" *Cruise on Real Property*, Vol. 5, pp. 510, 511 " (in one edition the page is 461), " lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.' "

Plaintiff, therefore, had title by relation from the date of the Sheriff's sale.

VI.

Under any possible theory of the case, the plaintiff is entitled to recover all of the land except the five acres which were enclosed and occupied by Harper, for defendants had no possession except of those five acres.

Concede that the contention of counsel for defendant (Defendant's Brief, p. 26), is correct

(it has been shown, *supra*, Point V., that it is not) that the plaintiff "did not acquire any title until the 17th of September, 1883, when Main conveyed to him the title he now claims under;" and concede further, as the defendant also contends (*Ib.*), that the Statutes of Limitation "run after the commencement of this action" (in other words, that the prescribed time expired before the 17th of September, 1883); concede all that is asked for in this respect, and yet the plaintiff is entitled to recover all the land except the five acres which Harper enclosed and occupied. For the defendants have never had any possession of any of the land but those five acres (Points III. and IV., *supra*).

Under any possible view of the case, therefore, the plaintiff is entitled to recover all the land except the five acres.

JOHN F. DILLON,
Of Counsel for Plaintiff in Error.

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CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 27.

JARED E. REDFIELD,
Plaintiff in Error,

vs.

WM. P. PARKS ET ALS.

Addition to Brief for Plaintiff in Error calling attention to an Arkansas Statute.

VII.

Under the Statutes of Arkansas the plaintiff had a right to perfect his legal title pendente lite and recover in this suit.

The State of Arkansas, in 1868, adopted the Code system of procedure. Under that system the practice in actions at law is, in many respects, assimilated to that in suits in equity; and among others, in this, that it is no longer necessary, as it was under the strict and technical system of Common Law pleading and practice for the plaintiff to have title *at the commencement* of the suit: it is sufficient if he acquires one after the

suit has commenced, the Code in effect adopting the more liberal and rational system of Equity pleading and practice.

The statute is as follows :

" The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the filing of the former complaint, answer or reply."

Mansfield's Digest, § 5084.

This is a general provision and applies to actions of ejectment, as the following statute (referred to by the Court below, Record, p. 10) shows :

" The defendant in his answer shall set forth exceptions to any of said documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiff shall in like manner, within three days after the filing of the answer, unless longer time is given by the Court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the Court, and shall be sustained and overruled, as the law may require ; and if any exception is sustained to any such evidence the same shall not be used on the trial, unless the defect for which the exception is taken shall be covered by the amendment."

Mansfield's Digest, § 2633.

Referring to the mistake in the Marshal's deed and to the deed to the plaintiff correcting the same, and to Section 2633, *supra*, the Court below says (Record, page 10) : " Upon proof of these facts the Court, *conformably to the practice under Section 2633, Mansfield's Digest*, permitted the plaintiff to amend his complaint and exhibits and perfect the written evidence of his title," etc. ; from which it would appear that the practice in Arkansas under the Code, which was adopted

and allowed in this case, is well understood. Burke vs. Snell, cited *infra*. Can any reason be given why, under the circumstances of this case, the plaintiff should be thrown out of Court in consequence of the mistake in his title being corrected *pendente lite*, and be compelled to bring a new action instead of having the rights of the parties determined in this action? Section 5084, Mansfield's Digest, *supra*, provides for precisely this case.

Defendant's counsel cites various authorities in support of the well-known jurisdiction and practice of the Federal Courts, that in an action of ejectment mere equities as contradistinguished from legal titles can not be adjudicated. Those authorities have no bearing upon the question now presented, since the plaintiff did not rely upon any equitable title, but upon a legal title conveyed to him *pendente lite* in fulfillment and consummation of a complete and antecedent equity, whereupon (as shown, *supra*, Point V.) his rights, legal and equitable, under the title thus consummated and perfected related back to the date of the Marshal's sale, which was prior to the date of the commencement of this action.

In support of the proposition that a legal title acquired by a plaintiff after the commencement of an action of ejectment will not be sufficient to sustain the action defendant's counsel cites Percifull vs. Platt, 36 Ark., 456. An examination of that case will show the Court, as it has us, that it cannot be said to decide that broad proposition or to apply to the case at bar, since the deed in that case executed by Lovejoy's administrator September 18, 1878, *pendente lite*, could not, in the very nature of the case, have been made in pur-

suance of and to consummate a complete antecedent equitable right and title. There was no reference in that case to and no construction of Section 5084 of Mansfield's Digest, which the plaintiff relies upon as intended to change and as effectually changing the technical common law rule that the legal title in the plaintiff must, under all circumstances, be complete at the time when he institutes his action. The Code provisions in Arkansas in respect of amendments *at any time* in furtherance of justice were understood and applied by the Court below in this case. See Burke vs. Snell, 42 Ark., 57, and the exposition of the Court as to the object of the Code on page 59.

Finally, we insist that, on the facts as found, the judgment should have been for the plaintiff. We therefore ask this Court so to declare, and to reverse the judgment and direct a judgment in the Court below to be entered on the findings of fact in favor of the plaintiff.

JOHN F. DILLON,
Of Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

JARED E. REDFIELD, *Plaintiff in error,*

No. 247.] v.

WILLIAM P. PARKS, et al., *Defendants in error.*

DEFENDANTS' BRIEF.

PRESS PRINTING CO., LITTLE ROCK, ARK.

In the Supreme Court of the United States.

JARED E. REDFIELD, *Plaintiff in error,*

No. 247.] v.

WILLIAM P. PARKS, et al., *Defendants in error.*

DEFENDANTS' BRIEF.

This was an action of ejectment brought by the plaintiff against the defendants in error for the recovery of a section of land in Miller county, Arkansas. The defendants denied that plaintiff was the owner of the land, or entitled to its possession, and pleaded title in themselves, and the two and seven years Arkansas statutes of limitations.

Plaintiff has failed to make a correct statement of the facts in his brief; and on account of this failure, the defendants state them as they appear in the transcript on file in this court.

STATEMENT OF FACTS.

They are as follows: The land in controversy, to-wit, fractional section 31, in township 15 south, and in range 28 west, formerly in Lafayette, now in Miller county, Arkansas, was, on the 10th day of December, 1856, a part of the public

lands of the United States subject to private entry. On that day the Mississippi, Ouachita & Red River Railroad Company purchased it from the United States, at her land office at Washington, Arkansas, and paid therefor in cash, and received the usual certificate of entry. A patent, in the usual form, was afterwards issued, bearing date the 15th day of April, 1875. The land was assessed for taxation for the year 1868; the taxes were not paid, and the land was returned delinquent and sold, in a body, for the non-payment of the taxes of that year, on the 10th day of August, 1869, and purchased for speculation by William P. Parks for the sum of $17.70, that being the amount of the taxes, penalty and costs due thereon. Parks received a certificate of purchase, and afterwards assigned an undivided half interest therein to James M. Montgomery; and on the 11th day of August, 1871, the County Clerk executed a deed to Parks and Montgomery, stating therein that the land had been sold on account of the non-payment of the taxes of 1868, and had not been redeemed within the time prescribed by law; and thereby conveyed the same to Parks and Montgomery. The deed was properly acknowledged and filed and recorded on the same day. In December, 1873, Parks and Montgomery, claiming the land under their tax deed, took actual possession of it, and remained in possession until they sold it to their co-defendants. "It is admitted by the plaintiff and the fact is," their co-defendants "have by proper deeds of conveyance ac-" quired all the right, title, estate and interest of the said Parks " and Montgomery in and to said land." When their co-defendants purchased, they took possession and have, thereafter always remained in possession.

On the 12th day of November, 1875, Charles Main and others recovered a judgment against the Mississippi, Ouachita & Red River Railroad Company for the sum of $2,802,547, in the Circuit Court of the United States for the Eastern District of Arkansas. An execution was issued upon this judgment, "and "said land was levied upon and sold on the 10th day of Octo- "ber, 1878, and was purchased by the plaintiff, J. E. Redfield, "for the sum of five hundred dollars, which was paid. At the "expiration of the time allowed by law for the redemption of "the land, the plaintiff requested the Marshal to execute and "deliver to him a deed for the same. A deed was prepared "and handed to him, which he and the Marshal supposed was "a deed to him for the land. On the 25th of February, 1880, "he brought an action of ejectment in the Circuit Court of the "United States for the Eastern District of Arkansas, against "Parks, for the land, which was dismissed on the 11th day of "April, 1881, Parks having disclaimed any interest in it. The "fact was, Parks had conveyed all his title and claim to the "land prior to the 25th day of February, 1880, and had no in- "terest therein. The defendants in this action, except Parks, "were not made parties to the suit commenced on the 25th of "February."

On the 11th of April, 1882, the plaintiff, being under the impression that the deed handed to him was a deed to him for the land in controversy, brought this action. Afterwards and in the progress of the present suit he discovered "that by a "clerical misprision of the Marshal's clerk, who drafted the "deed, the name of Charles Main, one of the plaintiffs in the "execution under which the land was sold, had been inserted "in the deed as purchaser and grantee instead of the plaintiff's

"name." "Upon proof of these facts the court, conformably "to the practice under section 2633, Mansfield's Digest, per- "mitted the plaintiff to amend his complaint and exhibits, and "perfect the written evidence of his title by counting upon "and filing a conveyance from said Charles Main to the plain- "tiff for said land, which was executed and delivered on the "17th day of September, 1883."

"In December, 1873, Parks and Montgomery, claiming the "land under the tax deed, had the exterior lines of the sec- "tion surveyed and marked, and had a survey made for the "purpose of ascertaining the center of the section, and in "January, 1874, they entered upon the land under said tax "deed and had a box-house, sixteen feet square, built at or "near the center of the section, and put Charles Harper in "possession of said house and section as their tenant and "agent under a written contract, he agreeing to protect the "land against trespasses and not to permit any timber to be "cut or carried off except upon the order of Parks and Mont- "gomery, and to give up possession to them, their heirs or "assigns, upon demand. Harper added two shed rooms "each eight by sixteen feet, to the box dwelling house; built a "crib and stable, and in 1874 he cleared and opened two and a "half acres, and in 1875 he cleared and fenced two and a half "acres more, making five acres in all; and since he has been on "the land he has set out fifty or sixty fruit trees. The improve- "ments are made of rough boards and logs and are inexpensive, "costing, probably, not much over one hundred dollars. Harper "moved into the house on the land not later than February, "1874, and has lived there continuously from that date down to "the present time, and as tenant and agent for Parks and Mont-

"gomery and their grantees in succession, including the defend-
"ants, has claimed for them the possession of the whole section,
"and has kept persons from cutting timber or otherwise tres-
"passing thereon, and has prosecuted persons criminally for
"trespassing thereon. The said land borders on the city of
"Texarkana, and the timber on it has been so well guarded and
"protected that the lines of the section can be distinctly seen
"and traced by the full growth of timber thereon. The center
"of the section (that is, the corner of the four quarter sections
"of said land) is either under the house or inside the inclosure
"around the house.

"No portion of said section has ever been inclosed, except
"the five acres heretofore mentioned.

"Parks and Montgomery, from the time they received the
"tax deed for said land, claimed to own the same, and sold tim-
"ber off the same, and assessed the same in their own names
"for taxation and paid the taxes thereon, and those claiming
"title by and through Parks and Montgomery, including the
"present defendants, have done likewise. Previous to the time
"said box-house was built on said land by Parks and Montgom-
"ery, and Harper put in possession of the same, said land had
"been wild and uncultivated and in the actual possession of
"no one.

"Harper occupied and protected the land for Parks and
"Montgomery and those claiming under them, including the
"defendants, for the privilege of living upon it and enjoying the
"improvements and getting his fire-wood and cultivating as
"much of the land as he pleased to put in cultivation, and he
"received no other compensation for protecting the land than
"the privilege of living upon it as aforesaid.

"Upon the foregoing facts the court, of its own motion, "declared the law to be—

"First—That said tax deed to Parks and Montgomery for "said land is void, because the land was sold for the taxes of "1868 on a day not authorized by law.

"Second—That under the laws of this State, notwithstand- "ing said tax deed is void upon its face, for the reason stated, "it constitutes a claim and color of title sufficient to put in "motion the statute of limitations in favor of any person taking "possession under it.

"Third—That the possession taken by Parks and Mont- "gomery of said land under said tax deed, in the manner set "out in the finding of facts, constitutes in law actual, peace- "able, open, notorious and adverse possession of the whole of "said land, and said possession of said land having been taken "by Parks and Montgomery as early as the month of Feb- "ruary, 1874, and maintained continuously by them and their "grantees down to the trial of this cause, the plaintiff's right "of action to recover said land is barred by the two years' "statute of limitation contained in section 4475 of Mansfield's "Digest, and also by the seven years' statute of limitation con- "tained in section 4471 of the same digest

"Fourth—That the ejectment suit brought by the plaintiff "on the 25th day of February, 1880, against W. P. Parks, for "said land, and afterwards dismissed, cannot extend the period "of limitation against the defendants in this suit, because "before that suit was brought Parks had conveyed his interest "in the land to the defendants in this suit, and the defendants "in this suit were in possession of the land, claiming title

"thereto, and were not made parties to said suit brought "against said Parks.

"Fifth—That upon the facts found the law of the case is "with the defendants and they are entitled to judgment "against the plaintiff.

(See printed transcript, pp. 7–16.)

The defendants recovered judgment.

LEGAL TITLE.

When the title of a plaintiff in an action of ejectment is controverted, he must prove, (1) that he had the legal estate in the premises at the commencement of the suit; (2) that he also had the right of entry; and (3) that the defendant or those claiming under him were in possession of the premises at the time when the suit was commenced.

Miller v. McIntyre, 6 Pet., 61.

Daniel v. Lefevre, 19 Ark., 202.

Fleming v. Johnson, 26 Ark., 423.

2 Greenleaf on Evidence, sec. 304.

An action of ejectment cannot be maintained in a Federal court on an equitable title; and it makes no difference if a State law allows the action to be maintained on such a title. If there are equities which show the right to be in a party who has not the legal title, they can only be considered in a Federal court on its equity side.

Foster v. Mora, 98 U. S., 425.

Sheirburn v. Cordova, 24 How., 423.

Fenn. v. Holme, 21 How., 481.

A legal title acquired by a plaintiff after the commencement of an action of ejectment in a Federal court will not be sufficient to sustain the action. To avail hmiself of it he must commence a new action.

McCool v. Smith, 1 Black, 459.

Litchfield v. R. R. Co., 7 Wal., 270, 272.

And the same is true in this State :

Perciful v. Platt, 36 Ark., 456, 465.

Section 2633, under which the plaintiff in this action was allowed to set up a legal title acquired more than *seventeen* months after the commencement of this action, reads as follows :

" The defendant in his answer shall set forth exceptions to " any of said documentary evidence relied on by the plaintiff, " to which he may wish to object, which exceptions shall spe- " cifically note the objections taken, and the plaintiff shall in like " manner, within three days after the filing of the answer, un- " less longer time is given by the court, file like exceptions to " any documentary evidence exhibited by the defendant, and " all such exceptions shall be passed on by the court and shall " be sustained or overruled, as the law may require ; and if any " exception is sustained, to any such evidence the same shall " not be used on the trial, unless the defect for which the ex- " ception is taken shall be covered by amendment."

Defendants insist that the court was not authorized by this section to allow plaintiff to set up an after acquired title. Even if it authorized such a proceeding in a State court a Federal court would have no right to follow it.

The plaintiff had no legal right to the land in controversy at the time of the commencement of this action, and for that reason, among others, could not maintain it.

The defendants relied upon the title derived from the tax sale, but the Circuit Court held it was void, because the land was sold for the taxes of 1868, on a day not authorized by law. There were two acts prescribing the time when lands should be sold for the taxes of 1868. The first required the sale to be made on the first Monday in October, 1869, and the other fixed no day for sale, but made the day of sale dependent on the time when the notice was published. The sale in this case was made under the latter act. Defendants insist that the sale was made on the right day, but they are so well protected by the statutes of limitations they consider it unnecessary to say anything in behalf of this contention.

TWO YEARS' STATUTE.

The two years' statute of limitation pleaded by defendants is as follows:

"No action for the recovery of any lands, or for the pos-
"session thereof, against any person or persons, their heirs or
"assigns, who may hold such lands by virtue of a purchase
"thereof at a sale by the Collector or Commissioner of State
"Lands, for the non-payment of taxes, or who may have pur-
"chased the same from the State by virtue of an 'Act provid-
"ing for the sale of lands forfeited to the State for the non-
"payment of taxes,' or who may hold such lands under a do-
"nation deed from the State, shall be maintained, unless it ap-
"pear that the plaintiff, his ancestor, predecessor or grantor
"was seized or possessed of the lands in question within two

"years next before the commencement of such suit or action." (*Mansf. Digest, 4475.*)

Plaintiff insists that this statute was repealed on the 23d of July, 1868, by an act which contained the following section:

"All actions to test the validity of any proceeding in the "appraisement, assessment, or levying of taxes upon any land "lot, or part thereof; and all proceedings whereby is sought "to be shown any irregularity of any officer, or defect or neg- "lect thereof, having any duty to perform under the provis- "ions of this act, in the assessment, appraisement or levying of "taxes, or in the sale of lands or lots delinquent for taxes, or "proceedings whereby it is sought to avoid any sale under the "provisions of this act, for irregularity, or neglect of any kind "by any officer having any duty or thing to perform under the "provisions of this act, shall be commenced within two years "from the date of sale and not afterwards."

Has the first, the two years statute, been repealed? A comparison will show that it has not. The object of the first was to prevent the maintenance of actions for the recovery of land, or for the possession thereof, against any person, or his heirs or assigns, who may hold it under a tax sale. To accomplish this object two things are necessary:

First—The defendant must hold under a tax sale, and,

Second—The plaintiff, or those under whom he claims, must not have been seized or possessed of the land within two years next before the commencement of the action. In other words, it declares that two years adverse possession by the defendant, or those under whom he claims, or both, shall be

sufficient to bar an action to recover land, if it has been held under a tax sale.

The second statute is a part of an act revising and amending the revenue laws of Arkansas, and has been re-enacted in many acts regulating the revenue, which have been passed by the General Assembly of the State of Arkansas. In every act in which it has been enacted, the following section has been a part:

"At any time *after* the lapse of two years from the time "of sale of any tract or lot of land for taxes, if the same shall "remain unredeemed, the Clerk of the County Court, on pro- "duction of the certificate of purchase, shall execute and de- "liver to the purchaser, his heirs or assigns, a deed of convey- "ance for the tract or lot described in such certificate."

Mansfield's Digest, section 5780. Section 140 of "An Act "regulating the assessment and collection of revenue," approved April 8, 1869. Section 125 of an Act with same title, approved March 25, 1871. Section 126 of an Act with same title, approved April 28, 1873.

So there is no inconsistency between the two statutes. The first statute can have no effect on a tax sale until the right to a deed has accrued. The purchaser could not take possession, legally, until then, when the second statute would have exhausted its force, as the two years mentioned in it would have expired.

The second statute came up for construction in *Radcliffe v. Scruggs, 46 Ark., 105.* The court said:

"What effect, if any, has this provision? Taken in con- "nection with section 140, which undertook to give to the

"recitals of the tax deed the force of conclusive evidence, that "each and every act and thing required to be done in order to "constitute a valid tax sale had been done, the intention of "the Legislature undoubtedly was to cut off all defenses "against the title after the lapse of two years, except that the "land was not taxable, or that the taxes had been paid before "sale, or that the sale had been redeemed from. Later acts "allowed the further defense that the owner labored under the "disabilities of coverture, infancy, insanity or imprisonment.

"But in this sweeping enactment the legislative depart- "ment transcended the boundaries of its powers. It could not, "under the Constitution of 1868, or any similar Constitution, "enact a statute which should transfer one man's property to "another, under a guise of sale for non-payment of taxes, "when there had been no assessment or no levy of taxes. "This would not be due process of law. Neither could it pre- "scribe a short period of time, nor indeed any period, within "which the owner must make his objections for such *funda-* "*mental* defects, he *remaining in possession* and being, in the "instance supposed, in *no default* for not paying his taxes."

And again the court says:

"Neither the validity nor the construction of this statute "has been settled by previous decisions of this court, further "than that it does not operate to deprive the former owner of "any meritorious defense. And by meritorious defense we "mean any act or omission of the revenue officers in viola- "tion of law, and prejudicial to his rights or interests, as "well as those jurisdictional and fundamental defects which "affect the power to levy the tax or to sell for its non-payment.

"But while the act cannot have the free course that its "framers intended, it is still our duty to give it such effect as "may be consistent with legal and constitutional principles. "And this may be best accomplished by restricting its opera- "tion to *mere irregularities or informalities* on the part of offi- "cers having some duty to perform in relation to the assess- "ment, levy of taxes or sale."

There is no doubt as to the power of the General Assembly to pass an act making any term of years of exclusive, adverse possession of land, even under a void deed or sale, a bar to the maintenance of an action to recover the land, or the possession thereof. The first statute is constitutional. The effect of the second is to prevent inquiry "into *mere irregularities or infor-* "*malities* on the part of officers having some duty to perform "in relation to the assessment, levy of taxes, or sale," after the expiration of two years from the sale. The object and effect of the first is, not to prevent inquiry into such irregularities or informalities, but to make two years' adverse possession of land, under a tax sale, a bar to a suit *for the recovery* of the land so held. There is no inconsistency in the object, effect, spirit, intent, or letter of the two statutes. The first has never been expressly or impliedly repealed, but on the contrary remains in full force and effect.

The seven years statute of limitation pleaded by defendants reads as follows:

"No person or persons or their heirs, shall have, sue or "maintain any action or suit, either in law or equity, for any "lands, tenements or hereditaments but within seven years "next after his, her or their right to commence, have or

"maintain such suit shall have come, fallen or accrued; and "all suits, either in law or equity, for the recovery of any "lands, tenements or hereditaments, shall be had and sued "within seven years next after title or cause of action ac- "crued, and no time after said seven years shall have passed: "*Provided*, that if any person or persons that are or shall be "entitled to commence and prosecute such suit or action in "law or equity be or shall be at the time said right or title first "accrued, come or fallen within the age of twenty-one years, "*femme covert* or *non compos mentis*, that such person or per- "sons, his or their heirs, shall and may, notwithstanding said "seven years may have expired, bring his or her suit or action, "so as such infant, *femme covert* or *non compos mentis*, his, her "or their heirs, shall bring the same within three years next "after full age, discoverture or coming of sound mind: *Pro-* "*vided, also*, that no cumulative disability shall prevent the "bar hereby formed and constituted by the saving of this sec- "tion."

Under this statute seven years' adverse possession will bar an action for the recovery of land. To constitute the possession necessary to bar an action under either of these statutes it must be actual, open, continuous, hostile and exclusive for the full period prescribed by the statute of limitations. Such a possession of a part of the land claimed under color of title would be a bar to an action for the recovery of the whole.

Ringo v. Woodruff, 43 Ark., 469, and authorities cited.

What is color of title?

COLOR OF TITLE.

"Most acts of limitation, if not all, in relation to entries "upon, and suits for possession or title to lands, are based, and "proceed, upon the assumption that the possession and title "commenced in wrong, and are defective and insufficient to es- "tablish title themselves, without the aid of the statute to "sustain them." Color of title is not received in evidence for the purpose of showing a valid title, but to show that the possession of the party claiming under it is adverse, and to mark the limits of it, and to show that the possession, which was at first wrongful, has become, under the statute of limitation, a complete bar to the recovery of the land described in the instrument under which it was held. Hence it would seem to follow that "any instrument having a grantor and grantee, "and containing a description of the land intended to be con- "veyed, and apt words for their conveyance, gives color of "title."

In *Hardin v. Crate, 60 Ill., 215*, it was held that "a deed "for land, which shows on its face that it is a conveyance of "land pursuant to a sale *made on a day not authorized by law*, "*is color of title*."

In *County of Piatt v. Goodell, 97 Ill., 84*, it was held that "a tax deed made under a sale of swamp land, which was *ex-* "*empt from taxation* as belonging to a county, as well as the "deed from such purchaser, constitutes color of title under the "limitation act of 1839."

In *Thomas v. Stickle, 32 Iowa, 71–77*, several tracts of land were sold for taxes in bulk for a gross sum. Mr. Justice Miller, delivering the opinion of the court, said: "It is insisted,

"however, by appellee, that inasmuch as this tax deed shows "upon its face that several tracts of land were sold for taxes in "bulk for a gross sum, it is void on its face. That the statute "of limitations applies only to a deed that is *prima facie* good. "In this view we cannot concur. This statute is one of re- "pose, and it was the manifest intention of the Legislature to "cure all such irregularities in the mode or manner of sale, "etc., which, within the five years' limitation, might render the "sale invalid. * * * If he must show a perfect title, by "showing a strict compliance with all the requisites of the "revenue law, before he can claim the benefit of the limitation "clause, that clause is practically useless. We cannot concur "in such a construction, a construction entirely annulling the "effect and meaning of a portion of the law."

In *Toll v. Wright, 37 Mich., 93–98*, the statute under consideration was as follows: "No action for the recovery of any "estate sold by an executor or administrator under the pro- "visions of this chapter shall be maintained by any heir or "other person claiming under the deceased testator or intes- "tate, unless it be commenced within five years next after the "sale; and no action for any estate sold in like manner by a "guardian shall be maintained by the ward, or by any one "claiming under him, unless it be commenced within five "years next after the termination of the guardianship, except "as hereinafter provided."

This statute presented the same question as is presented by the two years' statute of limitation relied on in this case. The differences are, the sale in the Michigan statute is a guardian's or administrator's sale, and the period of limitation five years, while in the Arkansas statute the sale is a tax sale and the pe-

riod of limitation two years, and other minor differences too small to notice.

In discussing the effect of a void administrator's sale under the Michigan statute, in *Toll v. Wright, supra*, Chief Justice Cooley, in delivering the opinion of the court, said: "That the "plaintiff claims title to the land in question through a deed "made upon a sale thereof by an administrator, is shown by "the finding. He is not, however, strictly within the words of "the statute, because he is not demanding its shield of pro- "tection as defendant, but is relying upon it to support his "cause of action as plaintiff. This, however, is not material; "for if his title has become perfected under the statute, so that "it cannot be questioned in a suit brought against him, neither "can it in a suit brought by him.

"The principal question to be considered under this statute "is whether one can rely upon it without showing that the "deed under which he claims was made to carry into effect a "a sale lawfully ordered. It is urged in behalf of the defend- "ant, with much ability, that a void administrator's deed can "not form the foundation for an adverse possession under the "statute; and that as the statute only purports to protect sales "made under the order, etc., of a competent court, a sale made "in reliance upon a void order is not within its provisions, that "being in law no order.

* * * * * *

"The question here is not whether a void deed might not "support an adverse possession, but whether an adverse pos- "session has been had under such a deed as that the statute "indicates.

* * * * * *

"The defendant insists that the statute 'was intended to ap-
"ply to sales in which the court had jurisdiction, but in which
"the proceedings are not void, but irregular and voidable.'
"* * * But it is said the sale protected must be made
"'under the provisions' of the statute, and that it is not so
"made if the court had no jurisdiction to order it. In strict-
"ness this is true; but as every sale which would be defective
"for want of compliance with any provisions of the statute
"would also, in the same sense, be not made 'under the pro-
"visions of the statute,' we cannot suppose the Legislature in-
"tended so narrow a construction. Indeed, such a construc-
"tion would defeat the statute entirely; for no sale is strictly
"under the provisions of the statute which is made in disre-
"gard of the statute in any necessary particular. Unquestion-
"ably the statute was intended to protect parties in the occu-
"pation of lands against defects of some sort, which without
"the statute would be fatal, or at least would render pro-
"ceedings voidable; in other words, to protect their occupa-
"tion under proceedings which in some particulars had not
"been pursuant to the statute, but in disregard to it.

"What, then, is the meaning of the statute when it speaks
"of sales 'by an executor or administrator, under the pro-
"visions of this chapter?' It certainly does not mean valid
"sales, for those need no protection. Neither can it mean
"sales lawfully ordered; for it makes no mention of any order,
"and speaks of sales only. Neither can it mean sales in
"which the statute has, in all important particulars, been fol-
"lowed; for the manifest purpose is to make an undisputed
"possession cure defects in the proceedings. Indeed, it can-
"not possibly, as we conceive, mean more than this; a sale

"purporting to be made under the provisions of the chapter, "and in pursuance of an order professedly based upon them. "If the administrator with such an order has made sale under "the provisions of this chapter, and given a deed under which "the necessary possession has been had, we think the case "fairly within the intent of the statute.

* * * * * * *

"But it is enough for us to couclude that here was an order "for the sale of these lands, made in reliance upon this statute, "and a sale made in pursuance thereof. Both the judge of "probate and the administrator must have supposed they had "this statute for their warrant; they assumed to be acting in "pursuance of its provisions, and we think nothing more is "requisite to entitle the purchaser and those claiming under "him to the benefits of limitation. Statutes of limitation are "statutes of repose, and we should seek, in construing them, to "give them the operation intended. We must not defeat them "by a strictness of construction it was never designed they "should be subjected to. *Let it be conceded that the adminis-* "*trator's sale was at the time void; the fact remains that the* "*court assumed to order it under the provisions of this statute,* "*and the administrator has followed its provisions in making* "*the sale.* It is consequently a sale 'pursuant to the pro-"visions' of the statute in the sense in which we understand "the Legislature to have employed those terms."

In *Pillow v. Roberts, 13 How., 472,* in which the Arkansas statutes of limitations were considered and discussed, Mr. Justice Grier, after considering the tax deed in that case, according to its face, and concluding that it was, *per se, prima facie* evidence of a legal sale and a good title, then proceeds to

discuss the effect of the deed, considering it void upon its face, and said: "But assuming these deeds to be irregular and "worthless, the court erred in refusing to receive them in evi- "dence in connection with proof of possession in order to "establish a defense under the statute of limitation.

* * * * * * *

"Statutes of limitation are founded on sound policy. They "are statutes of repose, and should not be evaded by a forced "construction. The possession which is protected by them "must be adverse and hostile to that of the true owner. It is "not necessary that he who claims their protection should have "a good title, or any title but possession. A wrongful pos- "session, obtained by a forcible ouster of the lawful owner, "will amount to a disseizing, and the statute will protect the "disseizor. One who enters upon a vacant possession, claim- "ing for himself upon any pretense or color of title, is equally "protected with the forcible disseizor. Statutes of limitation "would be of little use if they protected those only who could "otherwise show an indefeasible title to the land. Hence, "color of title, even under a void and worthless deed, has al- "ways been received as evidence that the person in possession "claims for himself, and, of course, adversely to all the world. "A person in possession of land, clearing, improving and "building on it, and receiving the profits to his own use, under "a claim of title, is not bound to show a forcible ouster of "the true owner in order to evade the presumption that his "possession is not hostile or adverse to him. Color of title is "received in evidence for the purpose of showing the posses- "sion to be adverse; and it is difficult to apprehend why evi- "dence offered and competent to prove that fact should be re- "jected till the fact is otherwise proven."

See, also—

Logan v. Jelks, 34 Ark., 547–549.

Cofer v. Brooks, 20 Ark., 542.

In *Cofer v. Brooks, 20 Ark., 542,* and *Elliott v. Pearce, ib., 508,* it was held, that in an action of ejectment, evidence that the defendant held actual and continuous possession of the land sued for, for the full period of limitation, under a tax deed, was sufficient to defeat the action of the plaintiff, although the recitals in the deed failed to show a regular and valid tax sale, and the deed was void.

So we conclude that "any instrnment having a grantor and "grantee, and containing a description of the land intended to "be conveyed, and apt words for their conveyance, gives color "of title."

Hall v. Law, 102 U. S., 461.

Osterman v. Baldwin, 6 Wall., 124.

Beard v. Dansby, 48 Ark., 184.

Hodges v. Eddy, 38 Vt., 345.

Bell v. Longworth, 6 Ind., 273–277.

GOOD FAITH.

In some of the States it has been held that the claim of property under color of title must be made in good faith. In some of these States good faith is required by statute. Aside from statutes we think the weight of authority clearly sustains the rule that good faith is not necessary to sustain color of title under the statutes of limitation. This view is sustained by reason. For the act of the grantee in the instrument con-

stituting the color of title "in entering into possession is a "wrong, and his possession continues wrongful until it ripens "into a right by virtue of a continuance of the wrong for the "requisite statutory period. Without any title whatever, ex- "cept a naked claim resting in parol, and which the person "making knows to be groundless, it is universally held that "a title may be acquired to the extent of the actual occupancy. "Now, by what process of reasoning is any *bona fides* dispensed "with in the former case, and insisted upon when a person en- "ters under a color of title? True, in the latter case the occu- "pant is not restricted to his actual occupancy, but is treated, "under proper limitations, as constructively in possession of all "the land that is described in and *prima facie* conveyed by the "conveyance to him. It has never been intimated that the doc- "trine of constructive possession was extended to such cases "because of the good faith of the occupant in taking his con- "veyance, but it is predicated entirely upon the ground that the "conveyance marks the limit of his claim and operates as "notice to everybody of its limit and extent, and it is upon this "ground alone that the doctrine rests, subject to the condition "that there is an actual, open, visible, uninterrupted and hostile "occupancy of a part of the premises conveyed for the full "statutory period."

This view has been virtually held by the Supreme Court of Arkansas:

Cofer v. Brooks, 20 Ark., 542.

Elliott v. Pearce, ib., 508.

Ringo v. Woodruff, 43 Ark., 486.

Mooney v. Coolidge, 30 Ark., 655.

Logan v. Jelks, 34 Ark., 549.

There is no evidence in this case that defendants held in bad faith. Parks purchased for speculation, but we presume it has never occurred to any one, except the plaintiff, that any person could not buy for speculation in good faith. Such a doctrine would make merchants, and the whole commercial world dishonest, and taint all mercantile transactions with fraud, if it be true. In the absence of evidence to the contrary, it is presumed that Parks purchased in good faith.

Brooks v. Bruyn, 35 Ill., 394.

McMullens v. Erwin, 58 Ga., 429.

1 Wharton's Law of Evidence (3d Ed.), sec. 366.

ACTUAL POSSESSION.

What is actual possession?

To constitute actual possession of land it is not necessary that it should be inclosed or occupied as a homestead.

"The owner cannot occupy, literally, the whole tract—he "cannot have an actual *pedis possessio* of all, nor hold it in the "grasp of his hand. His possession must be indicated by "other acts."

"A house is said to be in actual possession, though not "occupied, the claimant having the key and exercising acts of "dominion."

No particular acts are necessary to constitute actual possession. Control and dominion, evidenced by any acts, give and constitute actual possession.

"By actual possession," said Chief Justice Field, in *Coryell v. Cain, 16 Cal., 573,* "is meant a subjection to the will and "dominion of the claimant, and is usually evidenced by occu-

"pation, by a substantial enclosure, by cultivation, or by ap-
"propriate use, according to the particular locality and quali-
"ty of the property." To the same effect, see—

Webber v. Clarke, 74 Cal., 11.

Lord Advocate v. Lord Blantyre, 4 App. Ca's, 770, 791.

Jones v. Williams, 2 M. & W., 331.

Ellicott v. Pearl, 10 Pet., 442.

Scott v. Delaney, 87 Ill., 148.

Burton v. Carruth, 1 Dev. & Battle, L., 2.

English v. Johnson, 17 Cal., 116.

Saxton v. Hunt, Spencer (N. J.), 492.

Beaupland v. McKeen, 28 Penn. St., 124.

TENANT'S POSSESSION.

It is not necessary that a claimant should occupy the land claimed by him in person in order to be entitled to the benefit of the statute of limitations. He can occupy by a tenant or agent. In *Gregg v. Forsythe, 24 How., 182,* Mr. Justice Campbell in delivering the opinion of the court, said: "The "present inquiry is, by what evidence must the actual resi-"dence on the land be supported to enable the patentee to "have the benefit of the act of limitation for seven years? And "it has been generally held, that the residence and possession "of land for seven years by a tenant inures to the benefit of "the landlord, so as to secure for him the protection of the act; "and that this protection is not confined to the pretended close "upon which the claimant resides, but also extends to the en-"tire parcel of land of which the legal possession has been

"maintained as a consequence of his actual possession and "residence." See authorities cited.

Martin v. Judd, 81 Ill., 488, 492.

CUMULATIVE POSSESSION.

The uninterrupted, adverse possessions of two or more persons holding in privity, one under the other, following in succession, without leaving the property occupied vacant, for the time prescribed by the statute of limitations, will create the statutory bar.

Chisty v. Alford, 17 How., 601.

DISMISSAL OF ACTION.

But plaintiff insists that he brought an action for the land before he was barred, dismissed and then renewed it within one year after the dismissal, and that for that reason the present action was not barred. The statutes fixing the time in which such action shall be brought does not enable him to prevent the statutory bar in any such manner. He voluntarily abandoned his action, and could not prevent the statute of limitation barring him by bringing a new suit within one year after the first was dismissed. Then all these suits were brought against Parks alone, and could not prevent the statute running in favor of anyone else. Before these suits were instituted it had commenced running in favor of the other defendants, and the time it had run in favor of Parks had become annexed to the time it had run in their favor, and could not be suspended by a suit against Parks. No action can affect anyone except the parties and those purchasing *pendente lite*. This is too

plain to admit of argument or make it necessary to cite authorities.

Gray v. Trapnall, 23 Ark., 510.

MAIN'S DEED.

Plaintiff contends that the statute of limitations did not run against him after the commencement of this action. But this is not true. He had no title at the commencement of this suit, and did not acquire any until the 17th day of September, 1883, when Main conveyed to him the title he now claims under, and he set it up by an amendment to his complaint. The amendment of the complaint, setting up the title claimed to be derived from Main, "so far as respects the bar of the act " of limitations," is equivalent to and not distinguishable from a new action. As against any right, title, claim or interest acquired by the deed from Main the statute of limitations continued to run until the amendment was made.

Sicard v. Davis, 6 Peters, 124.

Wilkes v. Elliott, 5 Cr. C. C., 611.

Logan v. Neilson, 10 Ind., 183.

EVIDENCE OF ADVERSE POSSESSION.

In *Greenleaf on Evidence, section 430,* the author says:

" When the defendant claims title to land, under a long " possession, he must show that the possession was open and " visible, notorious, exclusive and adverse to the title of the " plaintiff. It must be such that the owner may be presumed to " know that there is a possession adverse to his title; *but his " actual knowledge is not necessary, it being sufficient if, by " ordinary observation, he might have known.*"

Scott v. Delancy, 87 Ill., 148.

Patton v. State, 50 Ark., 53.

FINDING OF FACTS.

By agreement the court was permitted to try the issue of facts in this action. Its findings of facts are entitled to the same consideration as the verdict of a jury. If there is any evidence to support them this court should not disturb them. The main issue of fact, if not the only one, was, did defendants and those under whom they claim hold adverse possession for the statutory period? As to what constitutes adverse possession is a question of law, but the fact of adverse possession in every case is a question of fact for the jury or the court sitting as a jury to decide.

Bradstreet v. Huntington, 5 Peters, 438.

FACTS.

The land in controversy was well timbered. In December, 1873, Parks and Montgomery, claiming the land under their deed, took actual possession of it and had the exterior lines surveyed and marked; had a survey made for the purpose of ascertaining the center of the section; and in January following built a house in the center of it, and put Harper in possession, under a contract that he should keep off all trespassers and hold possession for them. To this house Harper added two shed rooms, and built a crib and stable on the land; and in 1874 he cleared and fenced two and a half acres; and in 1875 he cleared and fenced two and a half acres more, making five acres in all in cultivation, and planted an orchard on the same. From the time he first moved on the land down to the

present time, he has lived there continuously, and as tenant and agent for Parks and Montgomery, and their grantees in succession, including the defendants, has claimed for them possession of the whole section; and has kept persons from cutting timber or otherwise trespassing upon any part of the tract, and has prosecuted persons criminally for trespassing on the same. The timber, it seems, was valuable, and the defendants took great care to preserve it, and turned it to useful account by selling it from time to time, and thereby used the land for the most appropriate purpose. And what is very remarkable, this land borders on the city of Texarkana, and the timber on it has been so well guarded and protected that the lines of the section can be distinctly seen from the city and traced by the full growth of timber on the same! What stronger evidence could be given of dominion and control? What more appropriate use could have been made of it? What stronger evidence of adverse possession could be asked? A band of armed men, surrounding it, could not have maintained more effectual control and dominion. Add to this the fact, that Parks and Montgomery, from the time they received their deed, claimed to own the same, and assessed it for taxation and paid the taxes thereon, and that those claiming by and through them, including the defendants, have done likewise, and the proof of adverse possession for the statntory period is complete. The most stupid man could not have failed, by ordinary diligence and observation, to discover that the land was held adversely during all this time.

Plaintiff travels outside of the record to impute bad faith to Parks. He says Parks bought the land for a few dollars when it was worth ten thousand. There is no evidence of what the

land was worth when Parks bought it. The truth is, the land was wild, in a sparsely settled country, with no railroads near it; was difficult of access; the country was in bad condition; its future was gloomy; and the land of but little value. There was nothing strange in its selling for taxes. There was no market for lands, and they were expensive without profit; and it was no unusual occurrence in those days for such lands to sell for taxes. Since then the country has progressed. *Nine* years after, on the 10th of October, 1878, it was sold under execution for *five hundred dollars*, when the plaintiff claims he purchased it—less than what the government originally was paid for it in 1856. Railroads have been built near it, and the country around it has been settled up. The flourishing city of Texarkana has sprung up alongside of it as if by magic. On the 28th of April, 1885, the day on which this action was tried, and more than *sixteen years* after Parks purchased it, it was estimated by the Circuit Court to be worth $10,000.

The good faith of those who purchased from Parks and Montgomery is not impeached. Nothing has been said about their failing to pay full value. They are the parties in interest, and are entitled to the land. They are, to say the least of it, as meritorious as the plaintiff.

EXEMPTION FROM TAXATION.

At the close of his brief plaintiff insists that the land sued for was exempted from taxation by an act of the General Assembly in 1869. If true, it cannot affect this case. But it is not true. The Constitution of 1868 placed it beyond the power of the General Assembly to exempt it, and declared it should be forever subject to taxation.

Art. V, sec. 48, and Art. X, sec. 2, of the Constitution of Ark. of 1868.

St. L., I. M. & S. Ry. v. Loftin, 30 Ark., 693.

Railway Co. v. McShane, 22 Wall., 460.

As soon as the Mississippi, Ouachita and Red River Railroad Company paid the price for the land and received its certificate, "the contract of purchase became complete; the lands "were segregated from the public domain and became private "property, and thereafter taxable. It is of no moment that "the patent had not been issued. The government held the "naked legal fee in trust for the purchaser, who had the equit-"able title."

Witherspoon v. Duncan, 21 Ark., 240.

S. C. Affirmed on error, 4 Wall., 210.

Diver v. Friedheim, 43 Ark., 203.

Carroll v. Safford, 3 How., 441.

Smith v. Hollis, 46 Ark., 24.

Defendants respectfully insist that there is no error in the judgment of the court, and that it should be affirmed.

Very respectfully,

DANIEL W. JONES,
Attorney for Defendants in Error.

In the Supreme Court of the United States.

No. 27.

JARED E. REDFIELD,

Plaintiff in Error,

v.

WILLIAM P. PARKS ET AL.,

Defendants in Error.

Defendants' Reply to Additional Briefs of Plaintiff,

BY DAN W. JONES.

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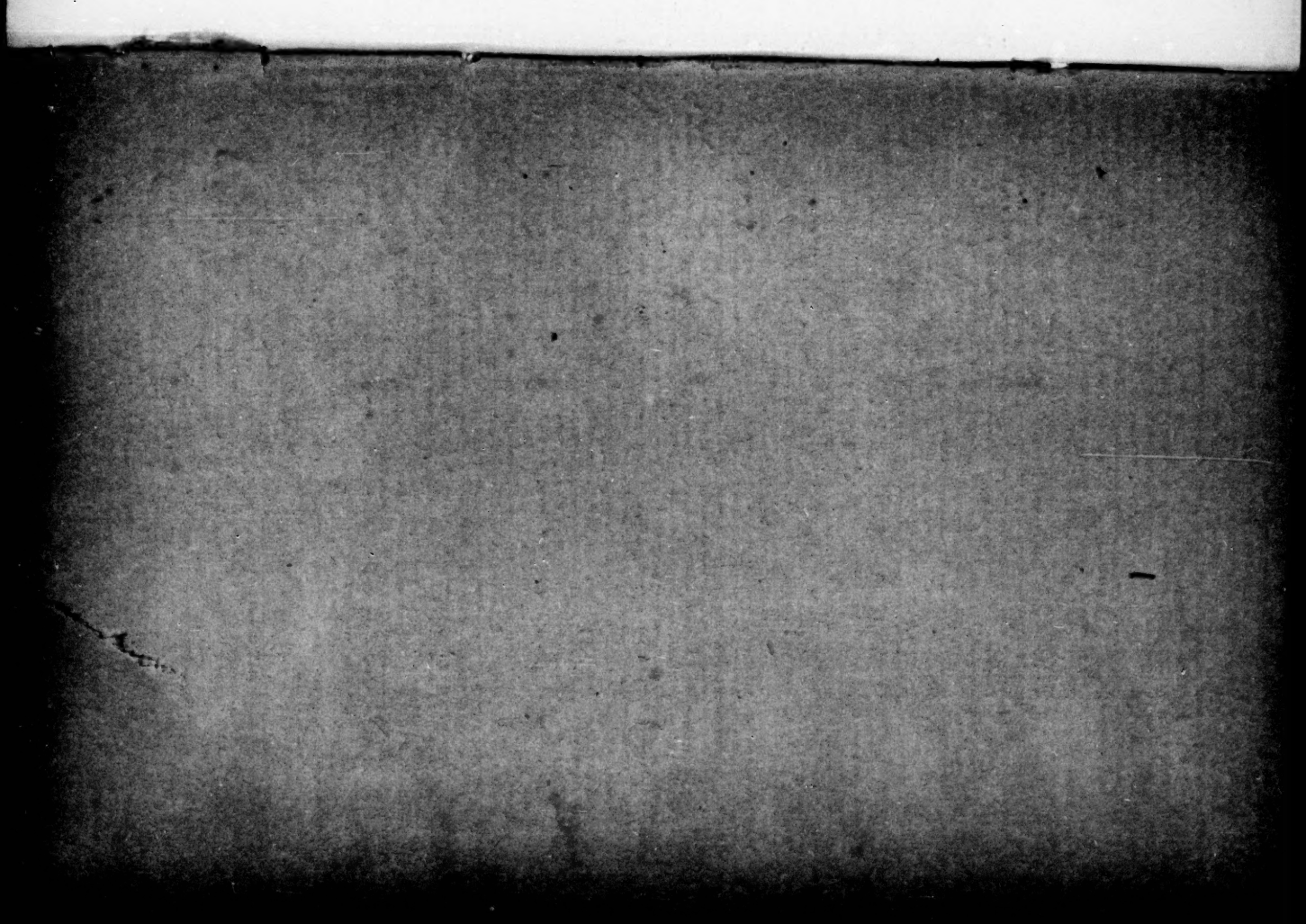

In the Supreme Court of the United States.

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JARED E. REDFIELD,
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Defendants in Error.

Defendants' reply to additional Briefs of Plaintiff.

Defendants made a statement of facts in the brief heretofore filed by them. But since then an additional transcript has been filed, in which the following facts alleged in the complaint of plaintiff and admitted in the answer of defendants appear:—The plaintiff was not in possession of the land in controversy at the commencement of this action. Before the commencement of it, he instituted a suit against William P. Parks for the possession of the land, and afterwards dismissed it. (Printed transcript, pp. 2, 7, 8, 11, 12.)

It is contended by plaintiff that his title is sufficient to maintain this suit, because at a sale made by a Marshal, under an execution, on the 10th day of October, 1878, he purchased the land in controversy, and it was conveyed by the Marshal, through mistake, to one Charles Main, and because Main, long after the commencement of this action, upon discovery of the mistake, conveyed it to plaintiff. He insists that he has title by relation from the date of the Marshal's sale. He at the same

time insists that the statute of limitations did not commence running in favor of defendants until a patent for the land was issued by the government of the United Scates, which did not occur until the 15th day of April, 1875, and in support of this contention cites *Gibson v. Chouteau, 13 Wall., 92.* An examination of the reports of this case will prove that it does not sustain his inconsistent contentions. For the court, in this case, says :

"The Supreme Court of Missouri, considering that by this doctrine of relation the legal title, which passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. 'The legal title,' said the court, 'in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before.'

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the *security and protection of persons who stand in some privity with the party that instituted proceedings for the land,* and acquired the equitable claim or right to the title. *Lynch v. DeBernol, 9 Wall., 315; Jackson v. Bard, 4 Johns., 230; Heath v. Ross, 12 Johns., 140; Littleton v. Cross, 3 Barn. & Cres., 325–328.* The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patentee wholly unaffected.

"In the Federal Courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement

of equitable rights, however clear, distinct equitable proceedings must be instituted."

In *Paul v. Tries, 18 Florida, 573, 581, 585,* the court said:

"The only recognized deed offered by the plaintiff to sustain his action was the tax deed dated *May 5, 1881,* witnessed and acknowledged, issued upon a sale for the taxes of 1875, *made May 4, 1876,* by the Collector of Revenue for Duval County. *This suit having been commenced September 14, 1880, the plaintiff had no title by deed on that day.* It is contended by the plaintiff (appellee) that the *period of redemption from the sale of May 4, 1876, having expired May 4, 1877,* he became at that time vested with an equitable interest in the land sold, and that the deed of May 5, 1881, vested in him the legal title pursuant to the sale, and *such legal title had relation to the expiration of the time of redemption and effective title as a legal title from that* time."

After a review of authorities the court further said:

"The clear result is that a tax deed executed on a day subsequent to the commencement of the suit cannot be introduced to prove the legal title of the plaintiff and his right of possession. Under the tax certificate, after the time of redemption had expired, the plaintiff, if he was then the holder of the certificate, had an equitable right, but not an estate under which he could recover at law, until he acquired the legal title by deed, which resulted from his equitable interest by force of the statute. He was not entitled to the possession or to rents and profits until his legal title was perfected, and that was acquired only by deed."

The doctrine of relation is not applicable to this case; it cannot be of any avail to plaintiff; the deed of Main is not admissible to show or prove that he held the legal title to the land in controversy at the commencement of this action.

But plaintiff further insists, that under the Code of Pleading and Practice of Arkansas, he had the right to file a supplemental complaint and allege therein the conveyance of Main to him. To support this contention, he cites Section 5084 of Mansfield's Digest, which reads as follows:

"The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the filing of the former complaint, answer or reply."

But this is a general statute, and does not repeal specific statutes governing actions of ejectment. Arkansas has other statutes which provide what is necessary to sustain such actions. Section 2627 provides in what cases the action of ejectment may be maintained, and is as follows:

"Such action may be maintained in all cases where the plaintiff is *legally* entitled to the possession of the premises."

And Sections 2628, 2630 and 2631 provide in what cases he can maintain the action when he is equitably entitled to the possession of the land. They are as follows:

"Sec. 2628. It may also be maintained in all cases where the plaintiff claims the possession of the premises, under or by virtue of

"*First*—An entry made with the Register and Receiver of the proper land office of the United States.

"*Second*—A pre-emption right under the laws of the United States.

"*Third*—Where an improvement has been made by him on any of the public lands of the United Stotes, whether the lands have been surveyed or not, and where any person other than those to whom the right of action is given by the preceding clauses of this section is in possession of such improvement.

"Sec. 2630. It may be instituted upon patent certificates issued by the Recorder of land titles for Missouri Territory upon New Madrid locations, and maintained against defendants not having a better title.

"Sec. 2631. It may be maintained in all cases where the plaintiff claims the possession of the premises under or by virtue of an entry made with the proper swamp land agent, or land agent of the proper land office of the State of Arkansas, and the patent certificates granted by any of the aforesaid officers shall be evidence of title in the party to whom it is granted."

These sections clearly imply that the action of ejectment

shall not be maintained in any other cases where the plaintiff has only an equitable claim or title to the land sued for.

Section 2632, which was enacted in 1875, and after the adoption of the Code of Pleading and Practice, is in the following language:

"In all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth *in his complaint all deeds and other written evidences of title on which he relies* for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff."

And Section 2635 is as follows:

"To entitle the plaintiff to recover, it shall be sufficient for him to show that *at the time of the commencement of the action* the defendant was in possession of the premises claimed, and that the *plaintiff had title thereto*, or had the right to the possession thereof."

Under Sections 2627, 2628, 2630, 2631, 2635, the Supreme Court of Arkansas has held:

When the title of a plaintiff in an action of ejectment is controverted, he must prove (1), that he had the legal estate in the premises at the commencement of the suit; (2) that he also had the right of entry; and (3) that the defendant or those claiming under him were in possession of the premises at the time when the suit was commenced.

Daniel v. Lefevre, 19 Ark., 202.

Fleming v. Johnson, 26 Ark., 423.

And long after the enactment of all these sections it held, in *Perciful v. Platt, 36 Ark., 456, 465,* that "a title acquired

after the commencement of an action of ejectment will not support the action."

The same rule prevails in the Federal Courts. To avail himself of such a title in those courts the plaintiff must commence a new action.

McCool v. Smith, 1 Black, 459.

Litchfield v. R. R. Co., 7 Wall, 270, 272.

But assume that he had the right to make the amendment, it would avail him nothing. The amendment, setting up the title claimed to be derived from Main, "so far as respects the bar of the act of limitation," is equivalent to and not distinguishable from a new action. As against any right, title, claim or interest acquired by the deed from Main, the statute of limitations continued to run until the amendment was made.

Sicord v. Davis, 6 Peters, 124.

Wilkes v. Elliott, 5 Cr. C. C., 611

Logan v. Neilson, 10 Ind., 183.

Suppose Main, on the 17th day of September, 1883, the time when he executed the deed to plaintiff, had brought this action, could he have maintained it? No. How then could plaintiff have derived from Main's conveyance any more rights than he had? It was impossible. If Main was barred from maintaining an action, so was plaintiff. "A stream cannot rise higher than its source."

It is contended in behalf of plaintiff, that the two years statute of limitation in force in Arkansas requires adverse possession, and that the defendant should claim under a deed

which of itself must be *prima facie* evidence of title; and that, while the ordinary long statutes of limitations require merely adverse possession, "the short statutes, such as the two years statutes in the present case, require adverse possession, and, as a compensation for the shortening of the time, that the defendant shall have something more than adverse possession." No such distinction is made by the authorities. The authorities cited by plaintiff to support it do not sustain his contention, as we shall proceed to show.

In *Sutton v. Stone, 4 Neb., 319*, the defendants sought to take advantage of Section 105 of the act of February 15, 1869, which provided that—

"Any person who shall hold possession of any land, *by virtue of any such tax deed*, for the term of five years, shall have acquired a complete title to said land, and all persons, after the expiration of said five years, shall be debarred from commencing any action to recover possession of said land."

The court said:

"The words, '*by virtue of any such deed*,' evidently refers back to deeds which had been before specified in that act to those provided for in Section 68. * * * We think the word 'such' was here used in a descriptive, and also in a *restrictive* sense, and requires not only that the deed shall be executed as provided in the act of 1869, but also, that it must have been executed under the authority of that particular act."

Hence, they concluded that the acts did not refer or apply to said deeds or deed under which the defendants claimed, because it was not executed under or in pursuance thereof. It was not executed in accordance with the act of February 15, 1869, because the seal of the county was omitted in its authentication, which the act positively required and made necessary to its validity. The court held that the defendants were not entitled to the benefit of the limitation contained in the act

under consideration, because it required "the possession to be not only hostile to the true owner of the land, but also under a particular description of sale, which must be evidenced by a deed, the essential and necessary ingredients of which are definitely described."

In *Trustees v. Payne, 3 T. B. Monroe (Ky.), 161*, the court said:

"Instead of twenty years mentioned in the general act, but seven years is required by the act of 1809; but to form a bar to an action, something more is *required by the latter act* than an adverse possession for seven years—the possession must have been acquired by actually *settling* upon the land, and must be continued, under an adverse interfering entry, survey or patent; and not only so, but the action must also be brought to recover upon an adverse entry, survey or patent."

We have not been able to find the act of 1809 alluded to, but we find an act in "The General Statutes of the Commonwealth of Kentucky," by Edward I. Bullock and others, in 1873, which is evidently the act of 1809. It is as follows:

"No action at law or in equity shall be brought under or by virtue of an *adverse, interfering entry, survey or patent*, to recover the title or possession of land from an occupant where he, or the person under whom he claims, has a connected title thereto in law or equity, deducible of record from the Commonwealth, and has or shall have had *actual occupancy by settlement* thereon, under such title, for seven years before the commencement of the action," etc. (See page 627.)

The decision of the court was evidently based on this statute, or one like it. It is evident it was not based on the shortness of the period of limitation. No such reason is assigned by the court.

In *Walker v. Turner, 9 Wheat., 541*, the court did not hold that the possession in that case was insufficient because the

act under which the defendant claimed was a "short statute of limitation," but on account of the peculiar wording of the act. The court held that a possession of seven years was a bar under the act, only when it was held under a grant, or under a deed founded on a grant; and that because the defendant showed no title under a grant, his seven years possession was insufficient to protect his title.

The decision of the court in *Skyles' Heirs v. King's Heirs*, 2 *A. K. Marsh* (*Ky.*), *385*, was not based upon the fact that the act upon which defendants rested was a short statute of limitation, but upon a construction of the peculiar phraseology of the statute. The court said:

"If a defendant is to be precluded from the benefits of the statute because his adversary is able to show that the defendant's title is wholly invalid by the production of his own, and that as the Commonwealth could grant but one title, and he, the plaintiff, had that, and of course the defendant could not have it, then the statute is a dead letter. For if the defendant can show that he has a clear title in law and equity, on that he must succeed, and there is no necessity of the statute to aid him. It is clear, however, that the statute is designed to operate against the plaintiff and prevent his recovery in a case where the plaintiff is able to show that he had all the title that the Commonwealth could grant, and the defendant was thereby stripped of his title. The fact of possession, then, is to avail the defendant, and estop the plaintiff from questioning his title, and the statute is predicated upon the hypothesis that the defendant's title is invalid; in that case it is to relieve him; with a valid title he has no need of it. The true construction, then, of the words of the statute, 'A connected title in law or equity adducible of record from the Commonwealth,' does and must mean such title when tested by its own face, and not tried by the title of others."

The statute of limitation, considered and construed in *Bowman v. Cockrill*, *6 Kan.*, *311*, reads as follows:

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid

on the land redeemed as provided by law, shall be commenced within two years from the time of *recording the tax deed of sale*, and not thereafter."

The bar of this statute did not depend on adverse possession, but the lapse of two years from the recording of the deed. In reasoning as to the intention of this statute, the court said:

"If the tax deed was absolutely void (so void that it could convey no title, nor affect any rights) it remained absolutely void, and in such case if the holder of the tax deed never took possession of the property, no cause of action ever existed in favor of the original owner of the land for the recovery of the same, for none of his rights had ever been disturbed. In the latter case, as in the former, where the tax deed was absolutely good, the statute of limitations could not apply. It is only when a tax deed is good *prima facie*, and when on account of some irregularity in the tax proceedings, the deed is void, or more properly speaking is voidable if attacked, that the statute of limitations can apply. In such a case the original owner of the land has been injured by the holder of a tax deed setting up a *prima facie* title to his land under a deed that is defective and voidable, and his cause of action accrues at least as soon as the tax deed is recorded."

The court laid no stress upon the possession of the holder of a tax title, but based the construction of the statute upon the fact, the owner of the land is not injured until the holder of a tax deed setting up a *prima facie* title to his land causes the deed to be recorded, and, consequently, no cause of action could arise until a deed *prima facie* good is recorded. In commenting on this statute in *Waterson v. Devoe, 18 Kan., 230*, the same court said:

"The fact of possession, and claim or color of title in good faith under a tax deed in this State, does not enter into, or constitute an element in the limitations prescribed in the statutes of 1862, or in the statute now in force. We cannot change said subdivision third to read, that 'an action for the recovery of real property sold for taxes, can only be brought

within two years after the date of the recording of the tax deed, where the person holding such deed has been *in possession* of the premises from the date of such recording, under claim or color of title made thereunder in good faith.' The law, as it stands upon the statute book, is the same as to persons out of possession, and claiming title to property under tax deeds, as to those in possession. The statute of the two years, by its terms, applies as much to the one as to the other. Possession is not referred to therein; nor does any claim of title, or entry under color of title in good faith, or otherwise, make a part of the provisions of limitation. We have no right to extend its conditions. We are only interpreters of the law."

In Wisconsin they have or had a statute of limitations like the Kansas statute, except the period of limitation was three years instead of two. In *Cutter v. Hurlbut, 29 Wis., 152,* the defendants held under a tax deed made in 1855. The land remained *vacant* more than three years after the recording of the deed.

The court held—

"That if the tax deed was void upon its face, it did not give defendants the constructive possession, and that the three years limitation did not run in their favor, but in favor of the plaintiff."

In *Lindsay v. Fay, 25 Wis., 460,* in considering this statute, the court held that—

"A person who has been in possession of the real estate for the time within which an action can be brought under this statute to recover property sold for taxes, after the date of recording of the tax deed (three years), claiming title in good faith under the tax deed, can successfully plead the statute of limitations, although the deed is void upon its face."

To the same effect see—

Edgerton v. Bird, 6 Wis., 527.

Sprecker v. Wakely, 11 Wis., 432.

Ocanto Co. v. Jerrard, 46 Wis., 326.

McMillan v. Wehle, 55 Wis., 685.

In Missouri they have a statute substantially the same as the Kansas statute. In *Mason v. Crowder, 85 Mo., 526,* the court held and placed the same construction upon it as the Kansas court did upon its statute, the court saying:

"It has been held in many cases that even a void tax deed constitutes color of title under the general statute of limitations, but the question of color of title does not arise under the *special statute in question.* The limitation is not based upon adverse possession."

In *Shuhy v. Hinds, 27 Minn., 259,* the court said:

"The sale itself being void, and the deeds being insufficient to make a *prima facie* case of title in the defendant, the question discussed as to the effect of the statute of limitations provided by Section 154, of said Chapter 1 of the General Statutes (1866), does not arise, as nothing is shown to have occurred to set the statute in motion."

Turning to said Section 154, we find it reads as follows:

"Action to test the validity of any proceeding under this chapter, or to determine any claim made under or by virtue of any such proceeding, shall be commenced within three years *after the sale* of the land for non-payment of taxes, and not otherwise; *Provided*, that in the cases contemplated by the Sixty-fifth (Sixty-fourth) Section of this Chapter, such action may be commenced within three years after notice of such sale."

Reading what the court said in connection with this statute, we infer the court meant to say that the deed showing that the sale was void, there was nothing to set the statute in motion.

In *Gorner v. Caffee, 6 Col., 314,* the defendant held under a tax sale, and pleaded the following statute:

"No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the sale thereof for taxes, as aforesaid, any law to the contrary notwithstanding," etc.

The court held that the sale was void, and that, therefore, "there was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion and the court said:

"It has been held that the statute would run in such a case where the tax purchaser in good faith took actual possession of the premises sold. Howsoever this may be, it does not aid the defendant, as he did not take actual possession until September 30, 1875,"

Which was less than five years before the commencement of the action, it being commenced April 6, 1878.

In *Wofford v. McKenna, 23 Texas, 36, 48*, and *Kilpatrick v. Sisneros, id., 113*, the construction of the statute of limitation pleaded in those cases depended on the meaning that was given to the words, "deed or deeds duly registered." The court held that what the deed meant by these words was, "an instrument which, by its own terms, or with such aid as the law requires, assumes and purports to operate as a conveyance; not that it shall proceed from a party having title, or must actually convey title to the land; but it must have all the constituent parts, tested by itself, of a good and perfect deed;" and that "a tax deed or Sheriff's deed may serve as the basis of the statute under consideration, without showing the warrant of authority;" but if it "be void upon its face, because of an impossible description, it will not support the plea" of limitation under the statutes in question.

Toll v. Wright, 37 Mich., 93-98, supports the contention of

defendants in error in this case. See their brief first filed, pages 16, 17, 18, 19.

In *Moore v. Brown, 11 How., 424*, the statute discussed and construed is as follows:

"Every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments of which any person may be possessed by actual residence thereon, *having a connected title in law or equity deducible of record* from this State, or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes, or from any Sheriff, Marshal, or other person authorized to sell such land upon executions, or any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid."

In construing this statute, Mr. Justice Wayne, delivering the opinion of the court in *Moore v. Brown, supra*, said:

"The Legislature must have meant by *title* something more than a void deed upon its face; a *title*, at least, which would be sufficient to induce the possessor of the land to think, and the law to conclude, that there was a foundation for a possession, under a right which had been acquired by a purchase."

From this view and construction of this statute, Mr. Chief Justice Taney, Mr. Justice Catron and Mr. Justice Grier dissented; the two first named delivering dissenting opinions.

In *Pillow v. Roberts, 13 How., 472*, this court, in speaking of the case of *Moore v. Brown, 11 How., 424*, said:

"The case of *Moore v. Brown, 11 How., 424*, had reference to a deed void on its face, and the consequence of this fact, *under the peculiar statutes of Illinois*; it furnishes no authority for the decision of the court below in the present case."

It is contended by plaintiffs that *Pillow v. Roberts, supra*, does not support our contention. That case involved the construction of one of the Arkansas statutes of limitations.

A tax deed was offered in evidence, and the inferior court refused to allow it to be read, because it was void on its face. In considering the questions thereby raised this court said:

"They present two questions: First—Whether by the law of Arkansas, the deeds offered in evidence (and which were regularly acknowledged and recorded according to law) should have been permitted to go to the jury *as* evidence of a regular sale of the land mentioned therein for taxes. And, Second—Whether, *without regard to their validity as elemeuts of a good legal title per se*, they should not have been received for the purpose of showing title, in connection with possession by the persons claiming under them, for a length of time sufficient by law to bar the entry of plaintiff."

This court held, as we understand it, that the deed ought to have been admitted in evidence as evidence of a regular sale; and that, even if it had been void on its face, it ought to have been received "in connection with proof of possession, to establish a defence under the statute of limitations." See defendant's brief, pages 19 and 20.

In referring to the cases of *Elliot v. Pearce*, *20 Ark.*, *508*, and *Cofer v. Brooks*, *id.*, *542*, in his additional brief, plaintiff says:

"These cases were decided under an early Arkansas statute, which is no longer in force. But those cases do not sustain the point for which they are cited. In *Elliott v. Pearce*, *supra*, it is true the tax sale was irregular, *but it does not appear that this fact appeared upon the face of the deed.* On the contrary, it seems from the language of the court that the deed must have been regular on its face."

The court said:

"It may be *assumed*, for the purposes of this case, that the objection made to the regularity of the tax sale are true in fact, and that the sale was irregular and illegal."

If plaintiff had turned to page 512 of the report of the case, he would have seen in the abstract of the brief of appellee this language:

"And there is no foundation for any statute of limitations to rest upon at all. For, the *tax deed* being *void upon its face*, and illegally obtained, it can afford no defense under the *five years* statute of limitations, as we have shown in our brief of *Cofer v. Brooks*."

Appellee in that case sought to raise the same question as plaintiff in error now seeks to raise in this. For at that time Arkansas had a long and a short statute of limitations; the long one being ten years, and the short one five years. The short statute was as follows:

"All actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any Collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter, saving to minors and persons of unsound mind, the period of three years after such disability shall have been removed." *English's Digest of the Statutes of Arkansas, Chap. 99, Sec. 6.*

In alluding to the objections of appellee, that the deed was void upon its face, the court said:

"It may be assumed, for the purposes of this case, that the objections made to the regularity of the tax sale are true, in fact, and that the sale was illegal and invalid."

And the court then said, after setting forth the five years statute at length:

"It is true that the tax sale was irregular, as conceded above, but it was sufficient, in connection with the actual possession of the land by Elliott during the entire period of limitation, to entitle him to have his possession protected and his title quieted. *Pillow v. Roberts, 7 Eng., 829.*"

In *Cofer v. Brooks, 20 Ark., 543*, the same objection was made to the tax deeds as was made in *Elliott v. Pearce, supra*. For we find in the abstract of appellant's brief this language:

"And, these deeds, each being clearly *void upon its face*, as Collectors' deeds, under a tax sale, *cannot* afford any pro-

tection whatever under the *five years special* statute of limitation—both upon principle and authority." (*P. 543.*)

In disposing of this objection the court said:

"It is insisted for the appellant that the court below erred in admitting the tax deeds offered in evidence by the appellee, because they failed to show regular and valid tax sales, and *were void*, etc. Without discussing the numerous objections made to the deeds, *most* of which are verbal criticisms, it may be conceded, for the purposes of this case, that their recitals fail to show regular and valid tax sales, *and that the deeds are void;* yet it was competent for the appellee to introduce them in connection with the evidence of his actual and continuous possession of the land for the full period of limitation, to defeat the action of the appellant, as held in *Elliott et al. v. Pearce*, at the present term. It is true, as stated by the counsel for the appellant, that in *Moore v. Brown, 14 McLean's R.*, Judge McLean held that a tax deed *void upon its face* could not avail a person who sets up a defense under the statute of limitations of Illinois, and this decision was sustained by a majority of the Judges of the Supreme Court of the United States (*S. C., 11 How., 414*), Chief Justice Taney, Mr. Justice Catron and Mr. Justice Grier dissenting. But in *Pillow v. Roberts, 13 How., 472*, it was held that the decision referred to was based upon a construction of the statutes of Illinois, and that under our statutes tax deeds, even if irregular and worthless are admissible in evidence, in connection with proof of possession, in order to establish a defense."

The quotation in plaintiff's additional brief (page 27) from the opinion delivered in *Douglass v. Flynn, 43 Ark., 398*, was the expression of the individual views of Mr. Justice Eakin. The majority of the court refused to adopt them or even discuss them. He says so in the closing paragraph of his opinion (page 413).

The two years statute of limitations pleaded by defendants is as follows:

"No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase

thereof at a sale by the Collector or Commissioner of State Lands, for the non-payment of taxes, or who may have purchased the same from the State by virtue of an 'act providing for the sale of lands forfeited to the State for the non-payment of taxes,' or who may hold such lands under a donation deed from the State, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor *was seized or possessed of the lands in question within two years next before the commencement of such suit or action.*"

It is not ambiguous; there is no room for construction; it admits of but one construction. If the plaintiff and those under whom he claims were not seized or possessed of the lands in question two years next before the commencement of the action, he is barred from maintaining it. In other words, if he was disseized or dispossessed for the two years, he is barred. How can he be disseized? Undoubtedly by adverse possession. It follows, then, if the defendant held two years adverse possession before the commencement of the action, it would be barred and plaintiff could not maintain it.

What are the facts in this case?

"On the 25th day of February, 1880, plaintiff brought an action of ejectment in the Circuit Court of the United States for the Eastern District of Arkansas, for the land in controversy, which was dismissed on the 11th day of April, 1881, Parks having disclaimed any interest in it. The fact was, Parks had conveyed all his title and claim to the land prior to the 25th day of February, 1880. The defendants in this action, except Parks, were not made parties to the suit commenced on the 25th of February."

On the 11th of April, 1882, he brought this action, still insisting he was dispossessed. More than two years elapsed between the times of the bringing of the two actions. In that time he was confessedly disseized and dispossessed. The evidence leaves no doubt as to who was in possession in that time. The defendants now claiming it were, and for a long time prior thereto. He is barred.

It is further contended by plaintiff that "the doctrine of *constructive* possession under color of title has no application in the case of large tracts of wild and uncultivated lands, such as were the lands in the present case," and that "therefore, even if the statutes of limitation had run, they would furnish no bar to the recovery of the land in controversy, except so much of it as was cleared and enclosed." This contention is wholly untenable. In the Federal Courts and in the courts of this State and other States, "the possession of a person who, under color of title, enters upon vacant lands, and holds adversely, is construed to include so much as is within the boundaries of his title, and to that extent the true owner will be deemed to be disseized"—the possession of a part being the possession of the whole.

Hunnicutt v. Peyton, 102 U. S., 333–368.

Clark v. Courtney, 5 Fet., 320–353.

Clymer's Lessee v. Dawkins, 3 Hord., 674–690.

Mooney v. Cooledge, 30 Ark., 656.

Wilson v. Spring, 38 Ark., 193.

Scott v. Delany, 87 Ill., 146.

Schultz v. Lindell, 30 Mo., 310.

Burks v. Mitchell, 78 Ala., 61.

Gardner v. Gooch, 48 Me., 487.

Color of title is received in evidence for the purpose of showing that the possession of the party holding under it is adverse, and to mark and define the limits of his claim, "and to show that the possession, which was at first wrongful, has

become, under the statute of limitations, a complete bar to the recovery of the land described in the instrument under which it was held."

In *Ellicott v. Pearl, 10 Pet., 441*, Mr. Justice Story, in delivering the opinion of this court, said:

"But this resolves itself into the points, whether it is absolutely necessary to constitute a possession of the land sufficient to bar an adverse title thereto under the statute of limitations, limiting writs of right to thirty years, that there should be an actual residence or fence by the party claiming the benefits of the statutes; that is, an actual residence on the land, or a *pedis positio* of it by an enclosure. * * * Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention to assert an ownership and possession over the property: Such as entering upon land and making improvements thereon, raising a crop of corn, felling the trees thereon, etc., under color of title. * * * The tract of 7000 acres conveyed by Edwards to Pearl, included, as has been already stated, both of the tracts of 2000 acres and 1000 acres claimed by the demandants within its boundaries. The house and settlement of Pearl were on the southern side of the 1000-acre tract; and the house and settlement of McCammon were within the 2000-acre tract, and near the center of the eastern line of that tract. Pearl entered into possession of the 7000-acre tract under his deed from Edwards; and as that deed described the tract by metes and bounds, Pearl must, upon the principles already stated, be deemed to have been in possession of the whole tract, unless some part of it was, which is not shown, in the adverse possession of some other claimant. In short, his entry being under color of title by deed, his possession is deemed to extend to the bounds of that deed; although his *actual settlement and improvements* were on a *small parcel* only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant of the party, upon the ground that it is his clear intention to assert such possession. This doctrine is well settled."

The judgment of the court in *Jackson v. Woodruff, 1 Conn., 276*, cited by plaintiff, was based upon the idea that the en-

closure and cultivation of an inconsiderable part of a large body of land embracing 783 acres, say two acres, in the absence of other evidence of adverse possession, was not sufficient to put the owner upon notice of adverse possession, and that to permit it to become a bar to recovery to the real owner "would be mischievous indeed." The closing sentence of the quotation from the opinion of Woodworth, J., in plaintiff's brief, is:

"It may, therefore, be safely affirmed, that a small possession, taken under the deed to N. Platt, cannot under any circumstances, be a valid possession of the whole 783 acres, but is limited to the *parcel improved*."

How large the parcel was we are not informed.

In *Munroe v. Merchant, 28 N. Y., 9*, there was in the tract claimed, under a deed constituting color of title, 1500 or 1600 acres:

"Upwards of 300 acres had been cleared, and the uncleared portion had been used exclusively for cutting timber trees, to be drawn and manufactured into lumber upon the cleared portion and elsewhere, and for fencing timber and firewood. This timber and wood had been taken indiscriminately from the parts of the tract where it could be most conveniently got at. The tract was not so large that it could not be used in one body. It was held that the claimants under the deed were in possession of the whole tract, within the rules of law as to adverse possession."

In New York the Legislature undertook to declare by statute what shall constitute constructive possession in that State

"It declared, in the first place, that where title is claimed exclusively under a written conveyance and there has been a continued occupation of the premises included in the conveyance, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely; except

that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot in the same tract;"

"That an uninclosed parcel of land is to be considered possessed and occupied, when it has been used for the supply of fuel or fencing timber, for the purpose of husbandry, or the ordinary use of the occupant."

And—

"That when a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

See *Munroe v. Merchant, 28 N. Y., 42, 43. Thompson v. Burhans, 79 N. Y., 93,* cited in plaintiff's brief, was decided under this statute.

Two opinions were delivered in *Thompson v. Burhans,* by Judge Earl, and are, respectively, reported in *61 N. Y., 52,* and *79 N. Y., 93.* In the first opinion he said:

"It follows, if I am right in the views above expressed as to defects in the tax proceedings, that the plaintiff had absolutely no title, and that both parties appear before us without any title. The plaintiff cannot therefore, in any aspect of the case, recover in this action upon the strength of his title. We must, then, consider whether he can recover upon the ground of a prior possession. He admits the possession of the defendants at the time of the commencement of the suit; and if he had shown a prior possession, then, the defendants entering upon that possession without right, would have been mere intruders and trespassers, and could not defend against the plaintiff; but if the land was vacant and the defendants entered they did no wrong to the plaintiff, committed no trespass upon him, and were in no sense intruders upon him. Here was a lot of over 25,000 acres, containing nearly forty square miles; it was sold at the tax sale in quarters and conveyed in quarters; a small portion, about 400 acres of the southeast quarter, only, was improved and actually possessed. This

possession was some miles distant from the land in question. There was never any actual possession of the northeast or northwest quarter in which the lands claimed were located. But it is claimed by the plaintiff that his possession in the southeast quarter, under his deed claiming title to the whole, gave him constructive possession of the whole. This claim is not sustained by any authority and not well founded. This township of over 25,000 acres was not one farm; it never would and never could be used as such; the balance of the whole township was not and could not be used in connection with cleared portion for any purpose appertaining thereto. The farthest that any case has gone which has come under my notice is to hold that where a person claims title under a deed, and thus has color of title to a farm or a lot of proper size to be possessed for a farm, or to be managed or used in a body, according to the custom and business of the country in which it is situated, and is in possession of the same, then he is constructively in possession of the whole." "Upon the last trial besides the proof of payment of taxes, claim of title and surveys" "the plaintiff gave further proof of acts done upon the northwest quarter of the township as follows: In 1852 or 1853, the plaintiff caused some lots to be surveyed in the northwest corner of the northwest quarter of the township. The first lot on the westerly side of the quarter, as thus surveyed, contained 940 acres. In 1858, one Ralph, by arrangement with the plaintiff, cut from this lot from 500 to 1000 pine logs and paid him for them. Nothing more was done upon the lot until December, 1864. Then the plaintiff, hearing that the defendants meant to enter upon the land under their claim, made an arrangement with Ralph, whereby he was to go upon the land and cut some logs there and build a shanty for the purpose of gaining possession of the land. The avowed intention of the plaintiff was to have just enough done to get the possession. That winter accordingly Ralph went upon that portion of the northwest quarter called lot number one and cut logs for a shanty, and constructed one without any roof. He cut over less than a quarter of an acre that winter, and was there in all not over three or four weeks. During the summer of 1865, a roof was put upon the shanty by Ralph and a barn was built. This was all that was done upon the lot before the commencement of the suit."

Earl, J., said:

"That there was any actual possession of the land recovered cannot be well claimed. It was not inclosed. No part of it had ever been cultivated or improved. Whatever was

done upon it was to take value from it, not to put value into it. It does not even appear that any one ever lived in the shanty, and no one representing the plaintiff was upon the land at the time of the alleged entry of the defendant or for some months before. * * * There was no attempt or intent to improve any portion of the land claimed. No part of it was inclosed or possessed for the purposes of a farm. The shanty and barn seem not to have been erected for permanent use, and this large tract of land was not intended for use as one farm or in any way in subserviency with that actually possessed. Hence, within any authority that can be found in this State, there was no constructive possession of any part of this land."

In *Chandler v. Spear, 22 Vt., 388, 404-406*, cited in plaintiff's brief, it was insisted on the part of the defendant that his actual possession of five acres, with a claim of title to the whole township of some twenty thousand acres, gave him the constructive possession of the whole township. The court said :

" The law of constructive possession declares that the deed of the lot to the settler, which may be found on record, and which describes with precision the boundaries of the land that he purchased, shall, so far as his title is concerned, be a substitute for a substantial and permanent fence around the whole ; that his possession of the lot, though actual but for a part, shall by force of his claim under the deed be constructive for the residue. This doctrine, when applied to a tract of land of suitable size for purposes of individual cultivation and improvement, seems justified and demanded by the wants and interests of a people in a new country ; and to tracts of such limited dimensions the doctrine has been usually, if not always, applied in this State. This is the first instance, that we are aware of, in which an attempt has been made, by means of clearing a few acres within the limits of an uncultivated township of some twenty thousand acres, to extend the possession, by construction, over the whole territory. It is obvious that the reason on which the doctrine of constructive possession is founded, ceases in such a case. Such an application of it is not required for the protection of *bona fide* settlers. No individual can ever want such an extensive tract of land for purposes of actual cultivation. The idea of inclosing such a tract with a permanent and substantial fence is too absurd to be gravely stated ; and the descriptive boundaries of it, in a

deed, could therefore never be a substitute for such an inclosure. It would also be *unjust to the real owners of the several rights of land in a township to allow them to be deprived of their title by an intrusion for a period of fifteen years upon a few acres in an obscure corner of the town, which intrusion might be either unknown to them, or not deemed of sufficient importance to deserve serious attention.* * * * * * *

"It is doubtless impracticable to specify any precise quantity of land that ought to be considered so far appendant to an actual improvement as to be the proper subject of a constructive possession. The quantity might probably be varied by the nature of the business of the occupant, his apparent means of using and improving the land, and perhaps by the character and extent of his actual possession, and by other circumstances. It is not intended to say that any quantity of land which may reasonably be supposed to have been purchased and entered upon for purposes of cultivation and for use as a wood or timber lot, might not be protected by such a possession.

"But the claim in the present case is altogether without the boundaries of any reasonable limit. The quantity of the land is not only too extravagantly large to be the possible subject of individual cultivation, or use, but the defendant's own evidence tended to prove, not that he had entered upon the land in good faith, for the ordinary purposes of settling upon it, but that all his acts upon the land had been done, in the language of the bill of exceptions; 'for the mere purpose of keeping a possession.' To hold that such acts upon a few acres of land should extend themselves over a whole township, to the exclusion of the title of the true owners, would be giving an effect to the doctrine of constructive possession heretofore unknown in this State, an effect which is as unnecessary to the protection of the rights of the actual occupant of land, as it would be unjust to the rightful owners."

In *Miller v. Shaw, 7 Serg. and R., 129*, relied on by plaintiff in error, the defendant entered *without title or even color of title.* The questions discussed in the case, as stated by Tilghman, C. J., were:

"The defendant entered without title, or even color of title; how then could he take away from the plaintiff the possession of any more than he actually cultivated or inclosed? If he took more, how much was it, and what was its limits?"

The question now under consideration did not arise in that case.

The well settled and established doctrine is, where one enters upon unoccupied land, under color of title by deed, his possession is deemed to extend to the bounds of that deed, although he actually settles and makes his improvements on a small parcel of the land.

"In such a case," says Judge Story, "where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party, upon the ground that it is his clear intention to assert such possession."

The cases in which the contrary has, apparently, been held are exceptional, and are cases in which the part of the land described in the grant, actually settled and improved, was so inconsiderable in comparison to the whole as to furnish no evidence of an intention to assert possession of all the land. The case of *Chandler v. Spear, 22 Vt., 388*, is one of these cases. In that case the defendant insisted, that his actual possession of *five* acres, with a claim of title to a whole township of some twenty thousand acres, of which the five acres was a part, gave him constructive possession of the entire township. The quantity of land claimed in that case was too extravagantly large to be the possible subject of individual use. It was unreasonable to suppose that the defendant in that case, by the actual occupation of *five* acres, intended to assert possession of the 20,000. In that case and the other exceptional cases referred to, the courts thought it would be unjust to the real owners, to allow them to be deprived of their property by an intrusion, for the statutory period of limitation, on a few acres in an obscure corner of an immense body of land, which was unknown to them, or if known, not deemed of sufficient importance to

deserve serious attention. When carefully examined it will be seen that the courts, in these cases, really meant to say that the facts proven in these cases were not sufficient evidence of the adverse possession necessary to put the statute of limitations in motion against the true owners.

But the quantity of land in controversy in this case is not "too extravagantly large to be the possible subject of individual use." It is small; it only amounts to 475 acres. It has never been claimed by less than two of the defendants at one time, and has always been held by them as tenants in common. They built houses in the centre of the land, upon the four quarters thereof, and cleared and inclosed each and all of the quarters, and made permanent improvements thereon, and occupied the same continuously and adversely at all times since Januay, 1874. All their acts manifest and assert a clear and unequivocal intention to claim and hold the same exclusively, adversely and against the whole world. They were and are, most unquestionably, in possession of the entire 475 acres.

But the defendants, who have claimed the land, were and are in the *actual possession of the entire 475 acres.* To constitute actual possession of land it is not necessary that it should be inclosed or occupied as a homestead. No particular acts are necessary to constitute it. Control and dominion, evidenced by any acts, give and constitute it.

"By actual possession," said Chief Justice Field, in *Coryell v. Cain, 16 Cal., 573,* "is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property."

"In *Simpson v. Blount, 3 Dev., 34*, Ruffin, Justice, declares that—

"'Exercising that dominion over the thing, and taking that use and profit which it is capable of yielding *in its present state* (the italics are his own), is a possession.'

"Of similar import is the definition given by Gaston, J., in *Williams v. Buchanan, 1 Ind., 535*, where he says that 'possession is denoted by the exercise of acts of dominion over it (property) in making the ordinary use, and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, and not of an occasional trespasser.'"

See—

Gudger v. Hensley, 82 N. C., 483.

In *Clement v. Perry, 34 Iowa, 567*, the court said:

"The rule of law is very well settled that when a person claiming land exercises acts of ownership of it, by the use of it for the purpose to which it is adapted, he is in such actual occupancy of it as will even bar an action after the lapse of the statutory time. *Such possession is as actual as that by inclosure.*"

See—

Moss v. Scott, 2 Dana (Ky.), 272.

In *Booth v. Small, 25 Iowa, 181*, Mr. Justice Beck, in delivering the opinion of the court, said:

"Possession of land is the holding of and exclusive exercise of the dominion over it. It is evident that this is not, and cannot be, uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of the ownership. The owner cannot occupy, literally, the whole tract—he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hand. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold the possession in fact of uninclosed land by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits it yields in its present condition—such acts, being continued and uninterrupted, will

amount to actual possession; and, if under color of title or claim of right, will be adverse."

See, also—

Ewing v. Burnett, 11 Pet., 52, 53.

Ellicott v. Pearl, 10 Pet., 442.

In *Leeper v. Wilson, 68 Mo., 405,* the trial court instructed the jury, among other things:

"A fence, building or other improvement is not essential to constitute an adverse possession. Acts of ownership, under a claim of right, visible, are sufficient to authorize the court to find such possession; and the nature of these acts of ownership must depend on the uses of which the land was capable."

Judge Napton said:

"These instructions are clearly in conformity to repeated decisions of this court, * * * and the verdict on them must have been based on the conclusion from the evidence that the acts of ownership in this case were 'visible,' and such as upon inspection would advertise the owner of an adverse claim. In *Draper v. Shoot* it was held that to constitute an adverse possession there need not be a fence, building or other improvement made, and that it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; that much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule in all cases, but that it may safely be said that where acts of ownership have been done on land, which from their nature indicate a notorious claim of property in it, such acts are evidence of an ouster of a former owner and an actual adverse possession, provided the property was not susceptible of a more strict or definite possession."

In *Kerr v. Hitt, 75 Ill., 60,* Justice Scott said:

"Actual possession of lands may arise in different ways, by acts of ordinary husbandry that indicate an exclusive use and control, and even by cutting timber upon it, or by any other acts that manifest an exclusive appropriation to one's own use.

It is not necessary a party should have his land all inclosed with a fence before he can be said to be in the actual possession. As a general rule it is sufficient if the land is appropriated to individual use in such a way as to apprise all persons in the vicinity who has the exclusive use and enjoyment."

In *Bell v. Denson, 56 Ala., 448*, Chief Justice Brickell said:

"The error of the charge lies in limiting the adverse possession of the land to such parts as were actually enclosed for farming purposes, and the part actually worked for gold. The inclosure is but one act indicating possession and claim of ownership. There are many other acts equally indicative of possession and the claim of ownership. The erection of houses, followed by subsequent occupancy, would be, perhaps, more evincive of possession and ownership, though they were never surrounded by inclosures, than inclosures of fields, sometimes cultivated and sometimes lying uncultivated. The possession must be by acts suitable to the character of the land; and being such it matters not what is its purpose, whether for cultivation, digging for ores, or for residence. Limited as the charge is in terms, it would have justified the jury in supposing that the houses, in which the appellants resided, were not held adversely, though the lands inclosed for farming, and the land which had been occupied in digging for gold were, and would have misled."

In *Saxton v. Hunt, Spencer* (*N. J.*), *492*, the court said:

"I do not think that a person claiming a right to land, by virtue of his adverse possession under color of title by deed, should be restricted to so much only as he had and those under whom he claims have had in actual occupancy, by substantial inclosures, or under cultivation; provided he has, for the requisite period of time, exercised such acts of ownership over the other parts of the land as are calculated to assert to the world a claim of right, or as will amount to actual possession. Whether these acts of ownership, or the conduct of the party, will be evidence of *actual* possession will depend upon the character of the land. We cannot expect the same evidence of occupancy of woodland as of a cultivated farm. Certain acts and conduct would be evidence of possession in the one case and not in the other. The question will always be, whether the use or occupancy is consistent with the character of the land. If a person, under color of title, enters npon a tract of woodland, and from time to time cuts and sells wood and timber thereon, or does other acts of ownership consistent

with the character of the land, it must be regarded as evidence of an intention to assert an ownership and possession of the tract; and if these acts are continued for twenty years he is protected by his adverse possession against the claim of the legal owner."

In *English v. Johnson, 17 Cal., 116*, the court said:

"Even actual possession, as applied to agricultural land, is from its nature somewhat constructive, for there is no such thing as a literal corporal holding of land, even within the limits of an inclosure. A house is said to be in actual possession, though not occupied, the claimant having the key and exercising acts of dominion; and, in truth, the whole doctrine of possession, if not created, must necessarily be controlled and modified by the peculiar nature of the subject and by surrounding circumstances. If town lots are covered by deep water would an inclosure be necessary to give actual possession, or a possession of equal efficacy? And if there were no timber or other means of fencing, and no necessity or use for fences in a large district, could there be any sense in holding such acts necessary to protect a possession from intrusion? So of mining claims, fences are not necessary to exclude cattle nor to give notice of a claim to given limits, nor is the power or dominion over them at all increased or facilitated by this process. The custom of the country does not require so useless a formality."

The main issue of fact in this case, if not the only one, was, did defendants and those under whom they claim hold adverse possession of the land in controversy for the statutory period? Plaintiff admits that he is not in possession. How was he dispossessed? On the 10th of December, 1856, the Mississippi, Ouachita and Red River Railroad Company purchased the land from the United States, and paid cash therefor, and received the usual certificate of entry. The land was assessed for taxation for the year 1868; the taxes were not paid, and the land was sold on account of the non-payment thereof, and purchased by William P. Parks. Parks received a certificate of purchase, and assigned an undivided half interest therein to James M. Montgomery; and on the 11th

of August, 1871, the County Clerk executed a deed to Parks and Montgomery, stating therein that the land had been sold on account of the non-payment of the taxes of 1868, and had not been redeemed, and thereby conveyed the same to Parks and Montgomery, which deed was properly acknowledged and filed for record on the same day. In December, 1873, Parks and Montgomery, claiming the land under their tax deed, took actual possession of it, and remained in possession until they sold and conveyed it to their co-defendants, when they took possession and have thereafter, and always, remained in possession.

Parks and Montgomery, from the time they received the tax deed, claimed to own the land, and caused it to be assessed in their own names, and paid taxes thereon until they sold to their co-defendants, and they have done likewise at all times since.

When Parks and Montgomery took actual possession of the lands in December, 1873, they had the exterior lines surveyed and marked; had a survey made for the purpose of ascertaining the center of the land; and in January following, built a house in the center of it, and put one Harper in possession, under a contract that he should keep off all trespassers and hold possession for them. To this house, Harper added two shed rooms and built a crib and stable on the land, and in 1874 he cleared and fenced two and a half acres, and in 1875 he cleared and fenced two and a half acres more, making five acres in all in cultivation, and planted an orchard on the same. From the time he first moved on the land down to the present time, he has lived there continuously, and as tenant and agent

for Parks and Montgomery and their grantees in succession, including the defendant, has claimed for them the land.

The timber, it seems, was valuable, and the defendants took great care to preserve it, and turn it to useful account by selling it from time to time, and thereby used the land for the most appropriate purposes. (To what extent they sold timber is not shown in the findings of facts by the court.) They kept persons from cutting timber or otherwise trespassing upon any part of the land; and have prosecuted persons criminally for trespassing on the same (to what extent is not stated in the findings of facts). And what is very remarkable, this land borders on the City of Texarkana, and the timber on it has been so well guarded and protected that the boundary lines can be distinctly seen from the city and traced by the heavy growth of timber on the same. No stronger evidence of dominion and control could be given; no stronger evidence of adverse possession could be asked. Any one, by ordinary observation, could have seen it was in the actual possession and protected by some one. But plaintiff says, that the growth of the timber indicated "that the true owner's possession was left undisturbed." This might be true if the land was situated in a forest, but if it was situated in the city and was left unprotected by the owner, it would be conclusive evidence of its being in the actual possession of some other person. This is equally true if it borders on a city. For there it would be as much or more exposed to depredations, as trespassers would have better opportunities to take away the timber without discovery or exposure.

The Mississippi, Ouachita and Red River Railroad Company, Main, and the plaintiff well knew that this land was sub-

ject to taxation, and that it would be assessed, and if the taxes were not paid, it would be sold, and, if not redeemed, would be conveyed to the purchaser, and that the purchaser would claim and take possession, unless prevented by the owner. Yet, notwithstanding this fact, no attention was paid to the assessment of it, and the payment of the taxes thereon, or to the land, until the 25th of February, 1880, when plaintiff discovering that he was dispossessed, brought suit against Parks for the possession of it, and on the 11th of April, 1882, dismissed it, and one year thereafter, on the 11th of April, 1883, brought this action. So it seems the control and ownership exercised over this land were, on the 25th of February, 1880, sufficient to put and did put plaintiff on notice that it was held adversely. If they were sufficient for that purpose, they were enough to put him on notice of whom the adverse holder was, because "whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everthing to which such inquiry might have led." (*Wood v. Carpenter, 101 U. S., 140.*) If they were sufficient, on the 25th of February, 1880, to put plaintiff on notice of an adverse holding, they were sufficient to have put the Mississippi, Ouachita and Red River Railroad Company, Main and the plaintiff, on notice of an adverse holding at all times since the month of January, 1874, because the same control and ownership have been exercised over the land at all times since then.

But we apprehend that this court will not stop to inquire into the evidence of adverse possession.

The Circuit Court sitting as a jury found that the possession was adverse, and was sufficient to put the statute of

limitations in motion for seven years, and the evidence sustains the finding. That settles that question in this court.

Very respectfully,

DAN W. JONES,

Attorney for Defendants in Error.

NOTE.—The defendants, their attorney who filed the original brief, and their counsel, resident at Washington, have been unable, in the very limited time allowed within which to answer the briefs filed on behalf of the plaintiff, on the 16th and 18th of October, to have any consultation and have been unable therefore to consolidate the matters which it is thought advisable to present to the Court, in a single brief.

By way of addition to the foregoing brief of Mr. Jones, we invite the attention of the Court to the following propositions:

I.

The parties waived a trial by jury; the Court below found for the defendants and every intendment ought to be made in this Court to support that finding.

This consideration disposes of the question as to whether there was "good faith" on the part of defendants, there is no finding that they did not proceed in good faith.

In some of the States, the statutes upon the subject of land tenures, provide that color of title must be associated with "good faith" on the part of the claimant under it.

There is no such provision in any Arkansas statute, but there was such a provision in a peculiar statute of Illinois, which was considered in Wright *vs.* Mattison, 18 How. 50.

In that case, the Court said:

"Good faith in a party claiming under such color is purely a question of fact, to be found and settled as the other facts in the case."

It will be observed, in passing, that this case of Wright *vs.* Mattison, discusses the subject of color of title in such a way as to dispose of that question, if there was really any doubt as to the law upon that familiar subject.

II.

It is said that this cause is not within the scope of the "two years statute," because the court below found that the tax deed was void.

But if it was a valid deed, ejectment would not lie either before or after the expiration of two years. The statute could only apply to a void deed; if the deed was valid and the plaintiff had any equitable rights in the property, he could not bring an action at law in a Federal Court.

It is only where a tax deed is void that such an action as this will lie, and if the statute has no application in the case of a void deed, it would be difficult to imagine a more nonsensical or useless piece of legislation, for it could not be invoked except in a certain contingency, and if that contingency existed, it could not apply.

Whatever may be the law in some jurisdictions, the law of Arkansas, as settled by the court of last resort of that state and in this court (Pillow *vs.* Roberts, 13 How., 472) is that a void deed gives color of title and will support a plea of the Statute of Limitations.

There is, however, another view we think not only important in this case, but decisive of it, and it is this: The "Two Years Statute," so-called, so elaborately debated in the different briefs, is not one of limitation based upon the possession of the purchaser; it is a statute of prohibition against bringing a suit like this, unless possession of the plaintiff or those under whom he claims existed two years before bringing the suit, and has nothing to do with the possession of the purchaser at the sale. In other words, the statute means simply this—that Redfield could not bring this suit unless he could show that he, his ancestor, predecessor, or grantor, was seized or possessed of the lands in question within two years, &c., &c., regardless of the possession of defendants.

The construction placed upon a former act, in the state

of Arkansas, in effect similar to this act, by the Supreme Court of that State is conclusive upon this point; Mitchell *vs.* Etter, 22 Arks. 178, Ib. 483; 2nd Blackw. Tax Tit. Sec. 902.

It must be apparent then, that it was not necessary, so far as Parks and those with him claiming under the tax sale are concerned, to show any possession at all, although if it had been, they have shown it completely, and the finding of the Court upon that point was correct.

The object of this statute is quite plain. Taxes and their speedy collection are necessary to the perpetuation of Government. To realize on delinquent taxes, inducements are offered to investors, and the legislature of Arkansas passed this two year statute, which prevents an action at law unless brought within two years after the owner is dissiezed.

It is hardly necessary to suggest that it is very much to the advantage of the grantee in a tax deed to have the person who attacks his title driven to a court of equity, where he must "do equity," or he will not be heard.

III.

The ordinary statute of limitations of Arkansas, applicable to all tenures, assuming that the two years statute does not apply, is seven years.

When the plaintiff began this suit he had never been in possession and the defendants, or their predecessors in the title, had been in possession of the land under the tax deed, more than eight years.

The title in the delinquent tax-payer originated by purchase in 1856, but the patent from the United States government was not issued until April 15, 1875, more than 19 years afterwards. It is difficult to understand why the ministerial act of issuing a patent for lands for which the purchase price was paid so long before, should not by relation carry the title back to the time of the original purchase.

To hold otherwise would be to enable a party to take advantage of his own wrong, a consideration that was not present in any of the cases cited in support of the proposition in the brief contra, that the statute did not commence to run until the patent was issued.

But this is an unimportant matter, for it appears that the plaintiff did not have title to the land, or any part of it, until more than one year and a half after he commenced this suit.

Assuming that all he says on this subject is true, he had only an equity, upon which he could not maintain an action at law, nor an action in equity without joining Main as a party defendant, for he possessed the legal title. The seven year statute, however, had expired when plaintiff received his deed from Main. He relies on this new demise, occurring after suit brought, as did the party in Sicard *vs.* Davis, 6 Peters, 124, but the court held in that case that where there was a new demise after the commencement of the suit, the institution of the suit did not interpose a bar to the running of the statute, and that the statute continued to run until the fact of the new demise was brought upon the record. In that case the fact was brought upon the record properly, by way of a replication; to amend this complaint, which must mean the striking out of certain words from it and the substitution of others, makes of it an unintelligible jargon, upon which no judgment can be based.

The case above referred to is so exactly like the case at bar in the principal involved as well as the relation of all the parties to the controversy, that unless the court is prepared to distinctly overrule it, the plaintiff can not prevail, for eight years and more had elapsed from the time of the accruing of defendants' title and possession, before the plaintiff brought the fact of title in himself upon the record.

Again, assuming all that the plaintiff says to be true, he

only had what this court has termed to be an "incipient equity," when he commenced his suit.

The doctrine is well settled as the former brief of the defendants demonstrates,that although a state may obliterate the line of demarcation between courts of equity and courts of law, such laws do not effect the federal courts, in which suitors must observe the distinction. The Constitution provides for the perpetuation of these distinct powers on the part of the courts of the United States. To permit the plaintiff to maintain this action upon an equity merely, would be contrary to all the decisions, and the question has been passed upon frequently.

IV.

The plaintiff seems to have abandoned all the various propositions of the original brief, except the one that the plaintiff can only hold the 4 or 5 acres which have been enclosed by a fence.

Defendants' possession has been much more exclusive than is made to appear. The land was actually occupied by an agent, or tenant of theirs; it does not appear that the trees which were set out were all on the land within the fence, or that the land outside of the fence was not called upon to contribute fire wood and other supplies for the defendants and their tenant; it does appear affirmatively that the possession has been so positive that the contour of the lot is distinguishable from the surrounding country by reason of the growth of timber which they have protected; that they have asserted the proprietorship to all the land by the prosecution of all trespassers; but beyond all this the deed upon which they founded their right of entry and under which they have had possession described and set out the whole lot by metes and bounds; they had possession and a deed which gave that color of title, such as this Court has always recognized as constituting a title, per-

fect in law, when accompanied with possession for the statutory term.

The main contention of the brief recently filed that the defendants can only hold the small parcel in the center of the tract is indeed a novel one. It is directly counter to the allegation of the complaint that the defendants were in possession of the whole tract, at the time suit was brought and had been for an indefinite period.

It makes the fact of non-possession by the defendants the reason why they should be ousted of possession. Plaintiff says: "the defendants are possessed of four or five acres, and I cannot eject them from that, but they are not possessed of some 600 acres adjoining, and because they are not possessed of this latter tract, I wish a writ of possession against them as to that land."

Could anything be more absurd than to claim that the plaintiff is entitled to a judgment of this court that he may have a writ to dispossess the defendants because they are not in possession?

The cases to be found in the brief contra on this point are those where a party who was possessed of a portion of a tract of land was the plaintiff, and was upon proof of his case, and that his boundaries had been extended by constructive possession. That is not the case at bar. Here the plaintiff Redfield in order to prevail, must make out two propositions, 1st. that he has the title, and 2nd. that the defendants have the possession, therefore, to say under this state of the pleadings, that the plaintiff is to recover because the defendants have not the possession of the tract, is so utterly repugnant to the theory of the action itself as to require only to be stated, for that statement carries with it the demonstration of its speciousness.

A. H. GARLAND,
A. G. SAFFORD,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 27.

JARED E. REDFIELD, Plaintiff in Error,

vs.

WILLIAM P. PARKS, et al., Defendants in Error.

MOTION FOR REHEARING.

A. G. SAFFORD,
A. H. GARLAND,
H. J. MAY,
Counsel for Defendants.

LAW REPORTER PRINT, 503 E ST.

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WILLIAM P. PARKS, *et al.*, *Defendants in Error.* } No. 27.

MOTION FOR REHEARING.

And now come the defendants in error in the above entitled cause and move for a rehearing therein.

And in accordance with the rule of this honorable court in such cases made and provided, the defendants in error state the following grounds therefor:

First. Because, in the view of counsel, the court did not, in its opinion, give a proper construction to the "Two Years' Statute," as it has been called.

Second. Because the Court determined that the statute did not commence to run until the actual issue of the patent by the United States Government.

Third. Because the Court determined that the Statute of Limitations stopped running the day when the plaintiff in error commenced his suit, without reference to the fact that the plaintiff did not then have the title, and that he did not acquire title, or bring the fact upon the record until nearly two years after the commencement of the suit.

And the defendants in error respectfully suggest that by reason of the method adopted for presenting the issues of

law to the Court, the fact of the original imperfect record, the filing of new and additional briefs by the plaintiff in error, and the very limited time allowed to the defendants in error to reply to the new briefs and the very voluminous discussion of the many issues presented, the vital questions mentioned as the grounds for this motion became obscured, and for that reason these points were not presented in such a way as to receive that consideration, which their importance demanded; particularly in view of the prior decisions of the Court upon the same subjects, with which it is believed the opinion filed in this case is in direct conflict. It is, therefore, quite important, if it is the intention of this honorable court to over-rule its former decisions, that such over-ruling may be positively stated in the opinion and not rest in mere inference.

I.

As to the two years statute; this statute was fully discussed in all briefs, but generally it was treated as a statute of limitation. This we conceive to be erroneous. It reads as follows:

"No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the Collector or Commissioner of State lands, for the non-payment of taxes, or who may have purchased the same from the State by virtue of an act providing for the sale of lands forfeited to the State for the non-payment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the lands in question within two years next before the commencement of such suit or action (Mansf. Dig., 4,475)."

This seems to us to be radically different from the ordi-

nary statutes of limitation, which apply to all suits, either at law or in equity. It is merely prohibitory of an action at law. If a tax deed is a valid deed, an *action at law* can not be brought in any case. A proprietor may have an *equitable* cause of action, in case of a valid tax deed, and may thereby ultimately regain the possession of his lands, but if driven to a Court of equity, he is required to "do equity:" such an action is not so beneficial to the complainant as an action at law. The meaning of this statute then, as we view it, was simply to prohibit an action at law, as distinguished from an action in equity, in all cases where the delinquent tax-payer not in possession suffered more than two years to run upon the recording of a tax-deed.

If it is intended to hold in this case that a void deed will not uphold title by possession, or that this two years statute does not apply to a void deed, then the case of Pillow *vs.* Roberts, 13 Howard, 472, is no longer to be considered as authority.

That was an Arkansas case. Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant, pleaded the general issue, and two special pleas.

In the case at bar, the pleadings of the defendant are identical with those in Pillow *vs.* Roberts, as to the subject-matter of the two special pleas above referred to. They are identical in substance and as nearly identical in form as they could be, in view of the change of the term of limitations which has been made in the statutes. Then, as now; there were two statutes on the subject, but the limitation of the shorter one was then five instead of two years, as now, and the longer one was then ten instead of seven years, as now.

The two special pleas of the defendant, Pillow, were as follows: The first set forth a sale of the land in dispute for taxes more than five years before suit was brought; the

second pleading the limitation of ten years. These pleas were overruled on special demurrer, as informal and insufficient, and the judgment of the court on the subject was alleged in the Supreme Court as error.

We have been thus careful to state the subject brought to this Court for revision in that case, that there may be no mistake as to the identity of the questions presented.

It is true that the court in that case held that there was nothing on the face of the deeds showing them to be irregular and void, but the court went further and said:

"2. But, assuming these deeds to be irregular and worthless, the Court erred in refusing to receive them in evidence, in connection with proof of possession, in order to establish a defense under the statutes of limitations."

The court, after stating that there are two clauses of the Arkansas statute, the one a "long" and the other a "short" term statute, says in regard to the application of statutes of limitations.

"It is not necessary that he who claims their protection should have a good title, or any title but possession. * * * Statutes of limitation would be of little use if they protected those only who could show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course, adversely to the world. * * * With regard to the five years limitation we need not inquire whether the legislature intended that the action should be barred where the purchaser at the tax sale was not in possession. In this case possession for more than five years, (*the "short" term*) by the purchaser from the collector and those claiming under him, was proved. In order to entitle the defendant to set up the bar of this statute, after five years adverse possession, he had only to show that he and those under whom he claimed, held under a deed from the collector of the revenue, of lands sold for the

non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to make the deed a valid and indefeasible conveyance of the title. If the Court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his title. The case of Moore *vs.* Brown, 11 Howard, 424, had reference to a deed void on its face, *and the consequence of this fact, under the peculiar statutes of Illinois;* it furnishes no authority for the decision of the court below in the present case."

The doctrine in the opinion in the case at bar, is at variance with the case from which we have just quoted, for there is in the statutes of Arkansas, no provision of similar import to that contained in the statute of Illinois. We do not contend that there is not eminent authority for regarding the "short term statutes" with disfavor, but this court has heretofore rigidly adhered to the doctrine of Pillow *vs.* Roberts, and if it is to be overruled it should be expressly considered and passed upon.

II.

As to that part of decision, that the statute does not commence to run until a patent has issued from the United States, we invite the attention of the Court to the case of Witherspoon *vs.* Duncan, 4 Wallace, 210. This was also an Arkansas case, and involved the question of the validity of a tax sale, before a patent had issued from the United States.

The facts of that case as bearing upon the case under consideration may be briefly stated as follows:

The children of Timothy Harrell furnished the requisite proofs of their being entitled to a patent for the lands, and were allowed on the 23d day of May, 1830, to enter on the lands in controversy. The proper certificate was transmitted to the General Land Office at Washington, but for some unexplained reason the patent was not issued until February 5, 1846. On June 8, 1836, the lands were entered by one Denton, who received the usual certificate of purchase. This entry to Denton was cancelled on the issue of the patent to the heirs of Harrell, and the money refunded to Denton in February, 1849. Therefore, during the time from June, 1836, to February, 1846, there were two outstanding certificates for the land in controversy, and while the title was in this situation, and more than four years before a patent was issued by the Government, the lands in 1842 were listed for taxation in the name of Denton and sold (because the taxes were unpaid) to Duncan and Flanigan, the defendants in error, who received a deed for them after the time for redemption had expired.

The exact question that was decided, therefore, was as to the effect of a tax deed while the patent still remained unissued. The decision of the court is too voluminous to reproduce in full, but is all pertinent and absolutely conclusive as to the propositions contained in the head-notes, "that lands originally public, cease to be public after they have been entered at the land office and a certificate of entry has been obtained. Lands so entered are liable to taxation and if the taxes remain unpaid, they may be sold like other lands, even though a patent may not as yet have issued."

In the case the court cites with approval the earlier case of *Carroll vs. Safford, 3 Howard, 450*, where the same doctrine is announced.

By reference to the briefs of counsel in both cases it will be seen that the very question here discussed was argued exhaustively. It will be observed that the reason upon which the cases proceed is, that after the certificate has

issued and before patent, the lands cease to be public. The argument is irresistible that if they cease to be public lands, the immunity of not being within the statutes of limitation, no longer attaches to them. To say otherwise, would be to say that they remain public lands, only for the purpose of preventing that salutary repose as to land titles, through the medium of statutes of limitation which the courts have always regarded with favor. If the State can tax the land and selling it give a valid title because the issuance of the certificate takes the land out of the category of public lands, then all the protection with which the law surrounds land titles should go with the sale. They are no longer public lands, the issue of the patent, where the certificate is regular—(and that is not attacked here)—is a mere ministerial act. The performance of that duty can be enforced by mandamus.

Indeed it is a fact known to everybody, that it is years and years sometimes, after the certificates are issued, before parties get their patents, yet they live on, cultivate the land, and enjoy its profits as securely as if they had the patents; and indeed, in some instances, they never get patents but rest on their certificates. It would be quite ingenious at least for parties thus using their certificates to evade payment of taxes, but then that cannot be.

Witherspoon vs. Duncan has received express and positive recognition by this Court in several important cases since.

Stark vs. Starrs, 6 Wall., 402.
Barney vs. Dolph. 97 U. S., 652.
Simmons vs. Wagner, 101 Ib., 260.

In the case at bar the certificate was issued in 1856; the patent was issued April 15, 1875.

If we understand the reason given for excepting these lands from the operation of the statute, it is to be found on the second page of the opinion as follows: "In the Courts of the United States where the distinction between actions

at law and suits in equity has always been maintained, the action of ejectment is an action at law, and the plaintiff must recover on the legal title. If it be shown that the plaintiff has not the legal title, that the legal title at the time of the commencement of the action, or at its trial, is in some other party, the plaintiff cannot recover."

This would be so if the plaintiff in error were necessarily driven to an action at law, in cases where a patent had not been issued. To sustain such an action, the doctrine above laid down is undoubtedly correct; but where the plaintiff could not obtain a patent, so as to lay the foundation for an action at law, a court of equity would always be open to him. This leads us to the consideration of the remaining question.

III.

As to whether the statute stopped running the very day when the plaintiff commenced suit, or whether it would not run until plaintiff brought the fact of the new demise which was the entry fraudulent of his title upon the record. In the consideration of this question it is assumed that the seven years statute—the "long term" statute only applies.

When this suit was brought (and it is to be borne in mind that it is an action at law in a Federal Court), 6 years and 361 days had elapsed from the time of the issue of the patent from the United States.

The plea of the defendants, among other things, was that the plaintiff had no title, and such was indeed the fact. Nearly two years had elapsed before the fact or the pleadings were changed. It turned out then, that the legal title was not in the plaintiff, but in one Mains, and on the 17th day of September, 1883, the plaintiff procured a deed from Mains, and subsequently obtained leave of the court to bring the fact of the new demise upon the record by a new pleading in the cause. The fact that the plaintiff had no

title to the lands when he began the suit, and did not bring it upon the record until nearly nine years after the patent issued, appears not to have been considered by this Court, at least it is not mentioned in the opinion, but it is said that the plaintiff, Redfield, purchased this land at a judicial sale on a judgment against the railroad company, thus treating the case as if plaintiff had legal title when he commenced suit.

In this connection, we invoke the rule so aptly laid down by the learned justice who announced the opinion, as announced in the portion, quoted at length above.

The case raises the question distinctly, as to when the plaintiff first interposed a bar to the running of the statute, that question was made, considered, decided and excepted to in the court below by the defendants as appears on the record. On the one hand it was claimed that the statute was avoided by the bringing of the suit, and the subsequent amendment in the manner indicated, and on the other hand it was contended that the statute bar continued to run until the plaintiff brought the fact of the new demise upon the record.

In this connection we earnestly call the attention of the Court to the case of *Sicard vs. Davis, 6 Peters, 124.* One of the questions passed upon in that case is identical with that of the present case, which is now briefly discussed: in that case the plea of the statute was sustained, here it is denied. The two decisions are irreconcilable, as will appear from a consideration of their identity in this respect.

In that case, the suit was commenced in March, 1815. At the November Term, 1821, the plaintiff obtained leave to amend his declaration by laying a demise in the names of the heirs of the original grantee of the commonwealth, or intermediate grantees, which amended declaration was filed January 17, 1822. The twenty years statute in force in Kentucky had not expired when the suit was brought, but had expired when the amendment was allowed, and there-

upon the court below charged the jury that if they found that the defendant had "and those under whom they hold, have continued to hold adversely to said Phillips the ancestor, and his heirs ever since, and for more than twenty years before the 17th of January, 1822, when the second count in the declaration was filed * * * then the said lessors are barred by the statute of limitations." Had this case been tried by jury and with such a charge, the plaintiff must have been cast in this suit as the plaintiff was in that.

To this charge to the jury the plaintiff in error excepted, and the question came to this court for revision.

Chief Justice Marshall delivered the opinion of the Court, and said, p. 140: "The third instruction, (the one above quoted), was correct."

To the same effect are the decisions.

Miller *vs.* McIntyre, ~~5 Cr. C. C., 61~~. 6 Peters 61;
~~Same Case, 6 Peters, 61, 6~~ McLean, 85. S.C.1.
Holmes *vs.* Trout, 7 Peters, 171.
Same Case, 1 McLean, 9.
Roe *vs.* Doe, 30 Georgia, 873.
Brown *vs.* Goldsby, 34 Miss., 437.
Wilkes *vs.* Elliott, 5 Cr. C. C., 614.
Schooner Harmony, 1 Gall., 124.
Buel *vs.* St. Louis, 45 Missouri, 562.

The authorities are uniform upon the question that the statute of limitations continues to run until the plaintiff brings the fact of title in himself upon the record. The case at bar is even more favorable to the contention of these defendants than was that of Sicard and Davis. In that case it appeared that the plaintiff had some sort of record title to which he might anchor; here the plaintiff at the beginning of his suit had no title; he was an utter stranger to it, and so continued for almost two years. During all this time there was a plea on the record averring that he had no title. He then finds that his suit must fail by reason of

his having no title, and proceeds to bring at that late day the title into himself, and asks leave to amend his pleading by bringing this new demise upon the record. The unmistakable inference from the present opinion is, that the statute stopped running before the plaintiff acquired title, or put the fact of his title on the record. These two opinions cannot both stand as the exposition of the law on this subject. Their conflict is irreconcilable. So far as the law upon this question may be inferred from the opinion of the Court, it is presently held that a plaintiff can recover in an action of ejectment in a Federal Court, even if he does not have title to the land when he commences his suit, provided he obtains title before trial, although the statute of limitations has run in favor of the defendant, when he obtains title and brings the fact of title in himself upon the record. This inference, which the judgment fully warrants, is in direct conflict with that portion of the opinion given out in this case which we have cited at length upon the second point of this motion.

It is there stated that the statute of limitations can not begin to run, because the plaintiff cannot bring an action of ejectment, until he has the title; in other words, title, legal title, not that which depends on a certificate of purchase, but the patent itself, must exist in the plaintiff when he commences his suit.

If this be the law, as to the commencemeut of the running of the statute, must not and ought not the same rule to be in force when it is endeavored by the same sort of a suit to interpose the bar of the statute?

In that portion of the opinion cited above, the learned justice says: "If it be shown that the plaintiff has not the legal title, that the legal title at the time of the commencement of the action or at its trial, is in some other party the plaintiff can not recover."

And yet, in this action, which is of the very kind de-

scribed, wherein the plaintiff did not have title at the commencement of the action, he is permitted to recover.

It is perhaps unnecessary to suggest that to permit a plaintiff to bring an action at law when he has no title, and afterwards procure title and by amendment interpose the suit to the statutory bar is fraught with great danger. It opens up a new field of speculation to the unscrupulous and the designing. It opens every title whose repose depends upon the statutes of limitation, to the greed of spoils-hunters, who, although entire stangers to the title, can bring suits to prevent the running of the statutes. And the doctrine has therefore prevailed that title at the commencement of the suit was (until the present decision) considered necessary to the maintenance of the action. But, as the court ought to interpret the laws of the several states as they have been interpreted by their courts of last resort, we must press upon the court what the Supreme Court of Arkansas has ruled so often as necessary to enable a plaintiff in ejectment to recover.

Under sections 2627, 2728, 2630, 2631, 2635, the Supreme Court of Arkansas has held: "When the title of a plaintiff in an action of ejectment is controverted, he must prove (1), that he had the legal estate in the premises at the commencement of the suit; (2), that he also had the right of entry; and (3), that the defendant, or those claiming under him, were in possession of the premises at the time when the suit was commenced.

Daniel *vs.* Lefevre, 19 Ark., 202.
Fleming *vs.* Johnson, 26 Ark., 423.

And long after the enactment of all these sections, it held, in Perciful *vs.* Platt, 36 Ark., 456, 465, that 'a title acquired after the commencement of an action of ejectment will not support the action.

The same rule prevails in the Federal Courts. To avail himself of such a title in those courts the plaintiff must commence a new action.

McCool *vs.* Smith, 1 Black, 459.
Litchfield *vs.* R. R. Co., 7 Wall, 270, 272.

But assume that he had a right to make the amendment, it would avail him nothing. The amendment, setting up the title claimed to be derived from Main, "so far as respects the bar of the act of limitation," is equivalent to and not distinguishable from a new action. As against any right, title, claim or interest acquired by the deed from Main, the statute of limitations continued to run until the amendment was made.

Sicard *vs.* Davis, Sup.
Wilkes *vs.* Elliot, 5 Cr. C. C., 611.
Logan *vs.* Neilson, 10 Ind., 183.

Suppose Main, on the 17th day of September, 1883, the time when he executed the deed to plaintiff had brought this action, could he have maintained it? No. How then could plaintiff have derived from Main's conveyance any more rights than he had? It was impossible. If Main was barred from maintaining an action, then so was plaintiff.

We know it is not an inviting entertainment to the Court, to be called on to review its opinions, but the history of this case here and the important points involved, will justify us, if justification be needed, in asking a rehearing. But beyond all this, we see the great landmarks in the law as announced by this Court heretofore. *Sicard vs. Davis; Pillow vs. Roberts*, and *Witherspoon vs. Duncan*, if not torn down and cast away, certainly greatly shaken and disfigured. If they are to go from us, jostled and crippled, we think

they are entitled to some appropriate parting words, as to the reason and necessity for parting company with them after all these years of association.

Respectfully submitted,

A. G. SAFFORD,
A. H. GARLAND,
H. J. MAY,
Counsel for Defendants.

We certify that in our opinion the foregoing motion is meritorious.

A. G. SAFFORD,
A. H. GARLAND.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 27.

JARED E. REDFIELD, PLAINTIFF IN ERROR,

against

WILLIAM P. PARKS ET ALS., DEFENDANTS IN ERROR.

MOTION.

Now comes the plaintiff in error in the above-entitled cause and moves the Court for leave to have an additional brief filed in his behalf, a copy whereof is annexed hereto, and for leave to have an oral argument made in his behalf at the bar of this Court when the above-entitled cause shall be reached in its regular order upon the docket, and the plaintiff in error states the facts in this behalf to be as follows:

This cause was reached on April 15th, 1889, the briefs of counsel for both parties having been theretofore filed in due course with the clerk of this Court. The court thereupon refused to consider the case on its merits for the reason that the record did not contain copies of the pleadings, and leave was granted to the plaintiff in error to sue out a writ of certiorari to bring into this Court the papers omitted from the transcript (Redfield *vs.* Parks, 130 U. S., 623). Such

certiorari was thereupon sued out, and return thereto has been duly made.

The plaintiff in error, who was president of a railroad company, brought this action to recover possession of land purchased by him as president of such railroad company as trustee therefor. Subsequently the interest of said railroad company as beneficiary of said trust devolved upon the parties in whose interests the plaintiff in error now moves. Plaintiff in error acknowledges said trust, and has at all times been willing to make conveyance, by way of execution of his trust, of the lands embraced therein. The present beneficiaries of said trust, upon whom has devolved the interest of said railroad company, as hereinabove set forth, did not, until subsequently to the proceedings under said writ of certiorari, have any notice or knowledge of the pendency of this suit. Immediately upon receiving such knowledge and notice an inquiry was made in their behalf into the then state of said proceedings, and, with the concurrence and consent of the plaintiff in error, they employed the undersigned as their counsel to represent said plaintiff in error in their behalf. This cause, under the order of this Court hereinabove recited, has been placed upon the docket of this Court as number 27, October term, 1889, and at the time when the same shall be reached in the call of said docket said cause will come up practically *de novo;* and it is submitted that in the due course of these proceedings the plaintiff in error should be at liberty to file such additional brief and to present such oral argument at the bar of this Court; but lest, in view of the proceedings heretofore had herein and hereinbefore recited, there may be doubt of the right of the plaintiff in error to so proceed as of course, and for

the reason that the amount involved in this controversy is very large, and that the present beneficiaries of said trust are advised that additional and important considerations affecting the decision of this cause should, in their interest, be presented to the Court, this motion is now submitted.

JOHN F. DILLON,
Of Counsel for Plaintiff in Error.

NOTICE.

(Duplicate notice.)

In the Supreme Court of the United States. October Term, 1889.

JARED E. REDFIELD, Plaintiff in Error,
vs.
W. P. PARKS *et al.*, Defendants in Error. } Case No. 27.

To DAN. W. JONES,
Attorney for Defendant in Error.

SIR: Take notice that the plaintiff in error in the above-entitled cause will, on the 14th day of the current month, October, 1889, at ten o'clock a. m., move for leave to submit an additional brief and to make oral arguments in the case on behalf of plaintiff in error, by attorneys, Dillon & Swayne, at which time you can appear and defend said motion in behalf of said defendants in error if you deem proper.

(Signed) SOL. F. CLARK,
DILLON & SWAYNE,
Attorneys for Plaintiff in Error.

I hereby acknowledge service of the above notice this 9th day of October, 1889.

DAN. W. JONES,
Attorney for Defendants in Error.

ARGUMENT.

We understand that no opposition to this motion will be made. In any event, however, we refer to the case of *Smelting Company* vs. *Kemp*, 103 U. S., 666, as fully sustaining the propriety of this motion upon the facts involved and as a precedent for its decision.

JOHN F. DILLON,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 8 1890
JAMES H. MCKENNEY
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1889. NO. 27.

JARED E. REDFIELD,
Plaintiff in Error,

vs.

WILLIAM P. PARKS *et als.*

Motion.

Now comes the attorney for plaintiff in error in the above-entitled cause, and moves this Court to enter its judgment of reversal herein as of a date prior to the 19th day of October, 1889, and that said judgment of reversal and the mandate of this Court herein shall authorize and direct the Circuit Court to enter its judgment on the facts found in favor of the plaintiff as of the term at which the said action was tried in the Circuit Court, or as of some suitable date prior to the 19th day of October, 1889, to be determined and fixed upon by this Court, and states the facts in this behalf to be as follows :

This cause was submitted to this Court on April 15, 1889, briefs of counsel for both parties having been theretofore filed in due course. The Court thereupon refused to consider the case on its merits for the reason that the record did not contain copies of the pleadings, and leave was granted to the plaintiff in error to sue out a writ of *certiorari* to bring into this Court the papers omitted from the transcript (*Redfield vs. Parks*, 130 U. S., 623). The writ of *certiorari* was thereupon issued and return thereto was duly made. Thereafter,

at the commencement of the present Term of this Court, the plaintiff in error made a motion for leave to submit an additional brief, which leave was granted. Thereupon, after deliberation, this Court rendered its decision, reversing the judgment of the Circuit Court, which was in favor of the defendant below, and directing final judgment for the plaintiff to be entered by the Circuit Court.

Attorney for plaintiff in error further states that Jared E. Redfield, the plaintiff in error, has died since the commencement of the present Term of this Court, to wit, on October 19, 1889, in proof whereof he submits the annexed affidavit.

Wherefore the attorney for plaintiff in error prays this Court to grant this motion as hereinbefore stated.

(Signed) JOHN F. DILLON,
Atty. for Plaintiff in Error.

Service of the above duly admitted by me January 1, 1890.

(Signed) DAN. W. JONES,
Atty. for Dfts. in Error.

Argument.

Where a party dies after the commencement of the term, and while the cause is under consideration by the Court, it is the practice of this Court and other Courts to order the judgment or decree to be entered *nunc pro tunc* as of the first day of the term or of a date prior to the death of the party.

Clay vs. Smith, 3 Pet., 411.
Bank of United States vs. Weisiger, 2 Pet., 331, note. 2 Pet. 481
Griswold vs. Hill, 1 Paine, 483.
Campbell vs. Mesier, 4 John. Ch., 334, 342.
Davies vs. Davies, 9 Vesey, 461.

Conghlin v. Dis. Col. 106 U.S. 7, 11
Mitchell v. Oaerman 103 " 62

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889. No. 27.

JARED E. REDFIELD,
Plaintiff in Error,

vs.

WILLIAM P. PARKS ET ALS.

Notice of Motion.

To DANIEL W. JONES,
Attorney for Defendants in Error.

SIR—Take notice that the attorney for plaintiff in error in the above-entitled cause will, on the 13th day of January, 1890, at 10 o'clock A. M., move the Court to enter its judgment of reversal herein as of a date prior to the 19th day of October, 1889 (the date of the death of Jared E. Redfield, the plaintiff in error), and that said judgment of reversal, and the mandate of this Court herein, shall authorize and direct the Circuit Court to enter its judgment on the facts found in favor of plaintiff as of the term at which the said action was tried in the Circuit Court, or as of some suitable date prior to the 19th day of October, 1889; and attorney for plaintiff in error hereby gives you notice to appear and defend said motion in behalf of said defendants in error, if you deem proper.

(Signed) JOHN F. DILLON,
Attorney for Plaintiff in Error.

Service of above duly admitted January 1, 1890.

(Signed) DANL. W. JONES,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889. No. 27.

JARED E. REDFIELD,
Plaintiff in Error,

AGAINST

WILLIAM P. PARKS ET ALS.

Affidavit.

STATE OF CONNECTICUT, }
County of Fairfield, } ss.:

I, B. A. HOUGH, being duly sworn, do state that I am a citizen of Danbury in the State of Connecticut; that that I knew Jared E. Redfield, the plaintiff in error, in his lifetime; that the said Redfield died in the State of Connecticut on or about the 19th day of October, 1889; and that I am the administrator of his estate duly appointed and qualified. Deponent further saith not.

(Signed) BENEZET A. HOUGH.

Subscribed and sworn to before me this 17th day of December, 1889.

{ NOTARIAL SEAL. }

(Signed) LEVI P. TREADWELL,
Notary Public.

Jan. 6, '90.—40.